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A TREATISE ON
PLEADING AND PRACTICE

IN THE COURTS OF RECORD OF

NEW YORK

INCLUDING PLEADING AND PRACTICE IN ACTIONS GENERALLY
AND IN SPECIAL ACTIONS AND PROCEEDINGS
AND APPELLATE PROCEDURE

WITH FORMS

BY

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FOR THE AUTHOR

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ALBANY, N. Y.,

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ART. I. NATURE AND KINDS.

§ 1850. Scope of chapter.

References are provided for not only by the Code chapter relating to trials without a jury, but also by many provisions scattered throughout the Code and the General Rules of Practice, in connection with the procedure on particular motions, actions, or special proceedings. For instance, references in matrimonial actions, in mortgage foreclosure actions, in partition, in supplementary proceedings, in insolvency proceedings, etc., are all governed by special Code provisions which will not be considered here but in subsequent chapters relating to such actions or special proceedings. The rules relating to references in general will be the subject of this chapter.

The compensation of a referee, and the mode of enforcing payment, will be treated of in a subsequent chapter relating to fees.

§ 1851. Resume of Code provisions.

References, as permitted under the Code, include what was formerly a reference in a common-law action and also what consisted in an equity action of referring matters to a master in chancery or clerk of the court. In equity, it has always been within the inherent power of the trial judge to refer matters to a master in chancery for a report to aid the court in determining the suit, but a reference was unknown at common law. The first statute in this state permitting a reference of long accounts in a common-law action was passed in 1768. Since then several statutes have been passed though the rules laid down have been subjected to very few changes.¹ References are divisible into references by consent and compulsory references. Compulsory references are divisible into (1) references to hear and determine all the issues; (2) references to hear and determine part of the issues; (3) references to the issue; (4) references to take an account and report to report on one or more specific questions of fact involved in

¹ For history of statutes, see *Saints Peter and Paul's Church*, 172 N. Y. 269.

Art. II. When Authorized.—A. Reference by Consent.

the court thereof either with or without the testimony; (5) references to determine and report on a question of fact arising in any stage of the action on a motion or otherwise, except on the pleadings; (6) references to approve, examine, inquire, appoint, or report facts; and (7) references as authorized by the practice of the court of chancery in 1846.

Compulsory references are also divided into references to hear and determine all the issues and interlocutory references. A reference ordered at any stage of an action or special proceeding for any purpose other than the trial of all the issues is usually termed an interlocutory one. In order to more clearly present the differences between such references the following table has been made up and the kind of reference is denoted by figures as used on the preceding page.

KIND OF REFERENCE	CODE SECTION AUTHORIZING	CONDITIONS PRECEDENT	PURPOSE	EFFECT OF REPORT	PROCEEDING IN WHICH ALLOWABLE
(1)	1013	Long Account	Hear and Determine	Basis of Judgm't	Actions Generally
(2)	1013	"	"	Ditto in Some Cases	Actions Triable by the Court
(3)	1013	"	Report Finding	Aid to Court	"
(4)	1015	Report	"	"
(5)	1015	Not of Issues	Determine and Report	"	Actions Generally
(6)	827	To Act or Report	"	Motions or Special Proceedings
(7)	827	"	Actions Triable by the Court

ART. II. WHEN AUTHORIZED.

(A) REFERENCE BY CONSENT.

§ 1852. Code provisions.

The Code provides that the whole issue, or any of the issues in an action, either of fact or of law, except an action to

annul a marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney-general; or an action wherein a defendant, to be affected by the result of the trial, is an infant,—“must” be referred, on the consent of the parties.² But even in the excepted actions, if the parties consent to a reference the court “may,” in its discretion, grant a reference.³ A reference may be ordered by consent in an equity case as well as in a common-law case.⁴

§ 1853. The consent.

The consent of the parties should be evidenced by a written stipulation signed by their attorneys and filed with the clerk.⁵ But it is sufficient that an order of reference is entered in open court with the consent of the parties,⁶ though a verbal understanding between the parties, subsequently withdrawn, is not sufficient.⁷ So it is sufficient that the order of reference recites that the action is referred on consent of the attorneys for each of the above parties, given in open court.⁸ The consent may be written by the parties, or by their attorneys, or by the clerk of the court in the minutes, or the referees who stand in the place of the court, in their minutes.⁹ The parties may also, by their acts, waive any further writing than in the minutes of the referee if more was otherwise necessary.¹⁰ It is sufficient that the plaintiff and the defendant who appear consent although a defendant who fails to appear does not consent.¹¹ The stipulation may name the referee except in the

² Code Civ. Proc. §§ 1011, 1012.

³ Code Civ. Proc. § 1012.

⁴ *Thurber v. Chambers*, 4 Hun, 721.

⁵ Code Civ. Proc. § 1011.

⁶ *People v. McGinnis*, 1 Park. Cr. R. 387; *Lennon v. Smith*, 47 State Rep. 483, 22 Civ. Proc. R. (Browne) 22, 18 N. Y. Supp. 213; *Keator v. Ulster & D. Plank Road Co.*, 7 How. Pr. 41.

⁷ *Morrison v. Metropolitan El. Ry. Co.*, 74 Hun, 639, 57 State Rep. 198, 26 N. Y. Supp. 858.

⁸ *Waterman v. Waterman*, 37 How. Pr. 36.

^{9, 10} *Leaycroft v. Fowler*, 7 How. Pr. 259.

¹¹ *Schwarz v. Livingston*, 46 State Rep. 477, 18 N. Y. Supp. 879.

actions mentioned in section 1012 of the Code. Parties may by stipulation confer upon a referee the power of an arbitrator, and may provide that he may not be governed by legal rules, and that his legal decision shall be final.¹²

— Form of consent.

[Title of action.]

We hereby consent that all the issues [or if only part of the issues, state what issues] in the above entitled action, be referred to [referee may be agreed on or not, but if he is, insert name here] to hear and determine the same and that either party may enter an order to that effect.

[Date.]

[Signature of plaintiff's attorney.]

[Signature of defendant's attorney.]

§ 1854. Order.

Notwithstanding the reference is by consent, an order of the court is necessary to entitle the referee chosen to act as such;¹³ but failure to enter a rule of court on a stipulation to refer is waived by the appearance of the parties and proceeding before the referee without objection.¹⁴ The order must be made by the court and not by a judge.¹⁵ An order of reference "to hear, try, and report to this court his opinion,"

¹² *Keep v. Keep*, 17 Hun, 152. The stipulation was "that both of said actions with all the issues therein involved be and the same are submitted to said referee for decision upon the evidence already taken, and such further evidence as said referee shall desire to take, and that judgment may be entered in each of said actions upon and in accordance with the report of said referee, and with a view to make the decision of the said referee final between the parties; it is hereby further stipulated and agreed that all objection and exception heretofore taken during the trial of said actions be, and the same are hereby waived and withdrawn, and that the judgment to be entered upon said reports shall be final and conclusive between all the parties, and no appeal be taken therefrom, and that said referee in making his decisions and report shall be at liberty to decide the question involved in said actions in such manner as he shall deem just, fair and equitable, irrespective of the legal rights of the parties to the controversy."

¹³ *Bonner v. McPhail*, 31 Barb. 106.

¹⁴ *Whalen v. Albany County Sup'rs*, 6 How. Pr. 278.

¹⁵ *Scudder v. Snow*, 29 How. Pr. 95.

Art. II. When Authorized.—A. Reference by Consent.

entered upon a stipulation of the parties after issue joined to refer the cause, for "hearing, trial, and determination," is to be construed as an order for the trial and determination of the issues, which is the only proper order that could be made by the court in such case.¹⁶ Further rules relating to the order which apply also where the reference is compulsory will be considered in subsequent sections.¹⁷

— Form.

[Title of cause.]

[At special term, etc.]

On reading and filing the consent of the parties hereto, and on motion of ———, attorney for ———:

It is ordered, that the above-entitled action and all its issues therein be referred to ———, counsellor at law, to hear and determine the same.

[Signature as in form in Vol. 1, p. 622.]

§ 1855. Who appointed referee.

The referee may be named in the stipulation in which case the clerk must enter an order, of course, referring the issue or issues for trial to that person only. If the stipulation does not name the referee, he may be designated by the court on motion of either party. If a reference is granted in one of the excepted actions, the court "must" designate the referee. If the referee named in the stipulation refuses to serve, or if a new trial of an action tried by a referee so named is granted, the court must appoint another referee, unless the stipulation expressly provides otherwise. So if the referee named by the court in one of the excepted actions refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, on the application of either party, appoint another referee.¹⁸ Except where the reference is in one of the excepted actions, if the parties agree that the case shall be referred to a particular person, the court has no jurisdiction to make an order referring it to another person unless the parties consent.¹⁹ But if the reference is in one of

¹⁶ Goodrich v. Goodrich, 21 Wkly. Dig. 264.

¹⁷ See post, § 1865.

¹⁸ Code Civ. Proc. §§ 1011, 1012.

¹⁹ Haner v. Bliss, 7 How. Pr. 246; Billings v. Vanderbrek, 15 How. Pr. 295.

the excepted actions, the referee must be designated by the court and the report of a referee agreed on by the parties will be set aside.²⁰ The reason for requiring the court to designate a referee in such a case is that in the actions specified the public have interests to be protected and the object is to prevent the obtaining of a collusive judgment.²¹ It seems that, if the parties agree on a referee, he is qualified to act as such except where the constitution or statutes absolutely prohibit his acting as referee. Thus, the appointment by consent of an attorney who occupies the same office as the plaintiff's attorney is proper.²² The question as to who may be appointed referee where the parties do not agree will be considered hereafter.²³

§ 1856. Number of referees.

Where a reference is made by consent of the parties, they may select any number of referees, not exceeding five.²⁴

§ 1857. Extent of reference.

The parties may consent, except in the actions already specified, to refer the whole issue or any of the issues in an action either of fact or of law.²⁵

§ 1858. Termination by reason of extrinsic events.

The death of the referee terminates the reference.²⁶ But the death of a co-party does not call for a vacation of the order of reference, though entered by consent;²⁷ but if an action is referred by consent, and after all the evidence is taken the court orders other parties to be brought in as defendants,

²⁰ *Fallon v. Egberts Woolen Mill Co.*, 24 Misc. 304, 53 N. Y. Supp. 672.

²¹ *White v. Coulter*, 1 Hun, 357, 3 T. & C. 608; *Perry v. Moore*, 2 E. D. Smith, 32, 3 Code R. 221.

²² See post, § 1867.

²³ Code Civ. Proc. § 1025.

²⁴ Code Civ. Proc. § 1011.

²⁵ *Devlin v. City of New York*, 9 Daly, 334.

²⁶ *Moore v. Hamilton*, 48 Barb. 120.

the new defendants cannot be compelled to accept the referee and the evidence even with the right of cross-examination secured to them, especially where the action does not appear to be one which can be referred without consent.²⁸

— **Effect of reversal on appeal or granting of a new trial.**

A simple reversal of a judgment based on the report of a referee does not operate to vacate the order of reference,²⁹ but where the direction is merely for a new trial the trial court must either name a new referee or vacate the order of reference, unless the stipulation otherwise provides.³⁰

§ 1859. **Effect.**

If the parties stipulate for a referee to take an account, the report of the referee cannot be objected to on the ground that no preliminary decree for an account has been made.³¹ The consent may work an abandonment of any claim that a prior stipulation worked a discontinuance of the action.³² Consent to a reference of the issues amounts to a consent of the exercise, in a proper case, of all the powers possessed by a referee under a compulsory reference.³³

(B) COMPULSORY REFERENCE.

§ 1860. **Examination of long account in actions triable by a jury.**

The Code provides that the court may, of its own motion

²⁸ Wood v. Swift, 81 N. Y. 31

²⁹ Lennon v. Smith, 22 Civ. Proc. R. (Browne) 22, 18 N. Y. Supp. 213; Kiersted v. Orange & A. R. Co., 54 How. Pr. 29.

³⁰ Knowlton v. Atkins, 134 N. Y. 313; Morgenthau v. Walker, 3 Misc. 615, 52 State Rep. 937, 23 N. Y. Supp. 1161; Mitchell v. Village of White Plains, 9 App. Div. 258, 41 N. Y. Supp. 496; Brown v. Root Mfg. Co., 76 Hun, 159, 57 State Rep. 301, 27 N. Y. Supp. 551. Where the parties have stipulated that the case shall be tried before a referee, but the special term refused to confirm a report of the referee, the order of reference will be vacated so far as it designates the referee and a new referee will be appointed to hear and determine. Bauer v. Bauer, 42 Misc. 557, 87 N. Y. Supp. 607.

³¹ Ludington v. Taft, 10 Barb. 447.

³² Birdsall Co. v. Ayres, 50 State Rep. 242, 21 N. Y. Supp. 898.

³³ Perry v. Levenson, 82 App. Div. 94, 81 N. Y. Supp. 586.

 Art. II. When Authorized.—B. Compulsory Reference.

or upon the application of either party, without the consent of the other, direct a trial of the issues of fact, by a referee where the trial will require the examination of a long account on either side, and will not require the decision of difficult questions of law.³⁴ The first question is whether any account at all is involved; the second question is whether the account is a long one; the third is whether there are difficult questions of law involved. The first two must be answered in the affirmative and the last in the negative, in order to warrant a compulsory reference of all the issues. The court has jurisdiction to order a reference in a common law cause of action notwithstanding the action is brought by an executor or administrator who opposes the granting of the order and demands a trial by jury, provided the action involves the examination of a long account.³⁵ A reference will not be ordered, however, where the account is not put in issue by the answer,³⁶ nor where it merely appears that the case may "possibly" involve the examination of a long account.³⁷ After the granting of a new trial of an action by a referee, the case will not be referred a second time, where from the first trial it appears that the examination of a long account will not be required.³⁸

The account must, however, arise in an action based on a contract,³⁹ as distinguished from a tort. An action based on

³⁴ Code Civ. Proc. § 1013.

³⁵ *Malone v. Saints Peter & Paul's Church*, 172 N. Y. 269.

³⁶ *Van Ingen v. Herold*, 46 State Rep. 425, 19 N. Y. Supp. 456.

³⁷ There must be enough alleged or shown to justify an inference that that will be the course of the trial. The same rule applies to equitable as to legal actions. *Thayer v. McNaughton*, 117 N. Y. 111; *Leary v. Albany Brew. Co.*, 66 App. Div. 407, 72 N. Y. Supp. 657; *Loverin v. Lenox Corp.*, 35 App. Div. 263, 54 N. Y. Supp. 724; *C. B. Keogh Mfg. Co. v. Molten*, 40 State Rep. 688, 16 N. Y. Supp. 65; *Cornell v. United States Illuminating Co.*, 41 State Rep. 172, 16 N. Y. Supp. 306. The court may not upon its own motion order a reference against the objection of a party unless it affirmatively appears that the examination of a long account is necessarily involved upon the trial. *Cassidy v. McFarland*, 139 N. Y. 201.

³⁸ *Beitjmann v. Brooks*, 22 State Rep. 472, 4 N. Y. Supp. 813.

³⁹ *Sharp v. City of New York*, 9 Abb. Pr. 426.

a tort or which sounds in tort will not be referred,⁴⁰ and this also applies to a reference to assess damages on defendant's default.⁴¹ This rule applies, *inter alia*, to actions to recover the value of property lost by the negligence of defendants;⁴² actions for malpractice;⁴³ actions to recover damages for death by wrongful act;⁴⁴ actions for conversion;⁴⁵ and actions founded on fraud.⁴⁶

— **What constitutes an account.** An account between the parties is one made up of the dealings of the parties with one another,⁴⁷ though the account may be with one party only.⁴⁸ Items of "damage" do not constitute an account,⁴⁹ nor does a bill of particulars.⁵⁰ A bill of particulars cannot make an action referable which was nonreferable without it.⁵¹ So one bill of goods, though containing fifty items, where the goods were delivered at one time, is not an account.⁵² The account must be between the parties to the action.⁵³

⁴⁰ *Beardsley v. Dygert*, 3 Denio, 380; *Harris v. Bradshaw*, 18 Johns. 26; *Wickham v. Frazee*, 13 Hun, 431; *Hyatt v. Roach*, 1 Abb. N. C. 125.

⁴¹ *Hewitt v. Howell*, 8 How. Pr. 346; *Boyce v. Comstock*, Code R. (N. S.) 290; *Thompson v. Finn*, 11 Wkly. Dig. 182.

⁴² *Hewitt v. Howell*, 8 How. Pr. 346; *Warner v. Western Transp. Co.*, 26 Super. Ct. (3 Rob.) 705.

⁴³ *Hoffman v. Sparling*, 12 Hun, 83.

⁴⁴ *Durkin v. Sharp*, 22 Hun, 132.

⁴⁵ *Clark v. Candee*, 29 Hun, 139; *Fiero v. Paulding*, 25 State Rep. 156, 2 Silv. Sup. Ct. 515, 6 N. Y. Supp. 122.

⁴⁶ *Townsend v. Hendricks*, 40 How. Pr. 143.

⁴⁷ *Dederick's Adm'rs v. Richley*, 19 Wend. 108.

⁴⁸ *Camp v. Ingersoll*, 86 N. Y. 433, 436; *Hossack v. Heyerdahl*, 38 Super. Ct. (6 J. & S.) 391.

⁴⁹ *Empire State Telephone & Telegraph Co. v. Bickford*, 142 N. Y. 224; *Johnson v. Atlantic Ave. R. Co.*, 139 N. Y. 449; *Allentown Rolling Mills v. Dwyer*, 26 App. Div. 101, 49 N. Y. Supp. 624; *Morrison v. Van Benthuyssen*, 103 N. Y. 675; *Untermeyer v. Beinhauer*, 105 N. Y. 521; *Mitchell v. Oliver*, 56 Hun, 208, 31 State Rep. 120, 9 N. Y. Supp. 367; *Blake v. Harrigan*, 38 State Rep. 26, 20 Civ. Proc. R. (Browne) 424, 14 N. Y. Supp. 663.

⁵⁰ *Dickinson v. Mitchell*, 19 Abb. Pr. 286.

⁵¹ *Starkweather v. Kittle*, 17 Wend. 20.

⁵² *Swift v. Wells*, 2 How. Pr. 79.

⁵³ *Quinn v. McDonald*, 32 State Rep. 722, 10 N. Y. Supp. 855; *Fromer v. Ottenberg*, 36 Misc. 631, 74 N. Y. Supp. 366.

 Art. II. When Authorized.—B. Compulsory Reference.

—What is a “long” account. No precise definition can be given as to what constitutes a “long” account. The decision of that question depends largely on the discretion of the trial judge.⁵⁴ It has been said that formerly four items were held sufficient to constitute a long account,⁵⁵ but no such rule exists at present. Every charge that may be dissected and distributed over a great number of items does not necessarily make a long account.⁵⁶ So an action on an account stated does not involve an examination of a long account though such an account consists of numerous items.⁵⁷ The best test seems to be whether the account is so long that the jury can not keep the items in their mind. Where the number of items to be litigated is not so great that the jury cannot keep in mind the evidence as to each, and give it proper weight and application, a motion for a compulsory reference will be denied.⁵⁸

—Difficult questions of law. A compulsory reference should not be ordered where the trial will require the decision

⁵⁴ An account, though containing many items, yet being of a single purchase, and made at one time, is not a long account. *Stewart v. Elwele*, 3 Code R. 139; *Whitaker v. Desfosse*, 20 Super. Ct. (7 Bosw.) 678. Four items is not a long account. *Parker v. Snell*, 10 Wend. 577. One bill of fifty items delivered at one time is not a long account. *Swift v. Wells*, 2 How. Pr. 79. A bill of seven items on only two different dates is not a long account. *Smith v. Brown*, 3 How. Pr. 9. One bill of lading of eleven different items is not a long account. *Miller v. Hooker*, 2 How. Pr. 171. Five items do not constitute a long account. *Dickinson v. Mitchell*, 19 Abb. Pr. 286. A reference will not be ordered where the separate transactions between the parties were few, although the details of each were numerous. *Farrell Foundry & Mach. Co. v. Anvil Horse Shoe & Nail Co.*, 11 Wkly. Dig. 350. But where plaintiff's bill of particulars consisted of over ninety items each of which was put in issue and would have to be proved by reference to plaintiff's or defendant's books, a compulsory reference was proper. *Hibbard v. Commercial Alliance Life Ins. Co.*, 4 Misc. 422, 53 State Rep. 517, 24 N. Y. Supp. 332.

⁵⁵ *Dickinson v. Mitchell*, 19 Abb. Pr. 286.

⁵⁶ *Hedges v. Methodist Protestant Church*, 23 App. Div. 348, 48 N. Y. Supp. 171.

⁵⁷ *Baker v. Walsh*, 9 Wkly. Dig. 18; *Rowell v. Giles*, 53 How. Pr. 244; *Marcus v. Philadelphia Arch Iron Co.*, 1 Month. Law Bul. 20.

⁵⁸ *Spence v. Simls*, 137 N. Y. 616; *Weidenfeld v. Woolfolk*, 26 Misc. 159, 56 N. Y. Supp. 740.

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of a difficult question of law, even if it would otherwise be proper, as involving the examination of a long account.⁵⁹ But in order to warrant the denying of a reference on the ground that questions of law will arise, the court must be satisfied that they will be questions of real difficulty.⁶⁰ However, difficult questions of law, under the statute, are not merely those arising from the facts presented by the issues, but include questions growing out of the very character of the issues, such as questions of evidence on an issue of fraud.⁶¹

— **Necessity that account be main issue.** The long account must be involved as a direct and substantial issue,⁶² i. e., it must be the immediate object of the action or of the defense and not the incidental or collateral object.⁶³ If independent issues are raised by the pleadings or issues, in an action triable by the court, the determination of which may render an accounting unnecessary, they should first be tried in the proper forum.⁶⁴ But in an action at law which must be tried by a jury, the mere fact that issues outside the account are raised is not alone enough to defeat the right to a reference.^{64a} A reference will not be ordered in the first instance if the substantial

⁵⁹ *Magown v. Sinclair*, 5 Daly, 63.

⁶⁰ *Anonymous*, 5 Cow. 423.

⁶¹ *Goodyear v. Brooks*, 27 Super. Ct. (4 Rob.) 682.

⁶² *Smith v. New York Cent. & H. R. R. Co.*, 29 Misc. 439, 61 N. Y. Supp. 934; *George F. Lee Coal Co. v. Meeker*, 43 Misc. 162, 88 N. Y. Supp. 190.

⁶³ *Camp v. Ingersoll*, 86 N. Y. 433; *Blake v. Harrigan*, 20 Civ. Proc. R. (Browne) 424, 14 N. Y. Supp. 663; *Keiser v. Plath*, 36 State Rep. 24.

⁶⁴ *Malone v. Saints Peter & Paul's Church*, 172 N. Y. 269; *Empire State Telephone & Telegraph Co. v. Bickford*, 142 N. Y. 224; *Chu Pawn v. Irwin*, 73 Hun, 182, 25 N. Y. Supp. 871; *Cuming v. Whiting*, 12 Civ. Proc. R. (Browne) 443, 9 State Rep. 830, 27 Wkly. Dig. 9; *Morrison v. Horrocks*, 40 Hun, 428. But the fact that, in an action for an accounting, which involves the examination of a long account on one or both sides, an issue is raised as to the character of the accounting, whether joint or individual, is no reason for denying a reference, where that issue is interwoven with the account itself and each of its items. *Owen v. Tyng*, N. Y. Daily Reg., Jan. 19, 1883.

^{64a} *Price v. Parker*, 44 Misc. 582, 90 N. Y. Supp. 98; *Boisnot v. Wilson*, 95 App. Div. 489, 88 N. Y. Supp. 867.

issue involved is fraud,⁶⁵ though an allegation in the complaint wherein an accounting is sought that an alleged settlement has been procured by fraud does not affect the jurisdiction of the court to refer the case since it merely shows plaintiff's right to have an accounting notwithstanding such settlement.⁶⁶ So a compulsory reference is not authorized by reason of the fact that an examination of the defendant's accounts with third persons will be necessary to determine the collateral question of his solvency at the time of alleged misrepresentations.⁶⁷ But if an examination of an account is necessary to establish the debt which it is the object of the action to recover by setting aside a fraudulent conveyance, the account does not present a collateral or subsidiary issue.⁶⁸ The examination of a long account, which the Code contemplates, is something more than mere formal proof of its existence. It imports an actual contest as to the correctness of the different charges, or at least, of several of them; a prolonged examination of witnesses upon the issue, conflicting proof, and a judicial inquiry and determination as to each one of numerous litigated items.⁶⁹

—— **Effect of joinder of causes of action.** A defendant cannot be defeated of his right to a trial by jury by the act of plaintiff in joining in the complaint causes of action which are not referable with those which are referable, where his purpose is to secure a reference of all the causes of action,⁷⁰ but this does not prevent a reference where several causes of action are set forth but they all arise from one transaction, so

⁶⁵ *Morrison v. Horrocks*, 40 Hun, 428; *Bamberger v. Fire Ass'n*, 58 Super. Ct. (26 J. & S.) 244, 10 N. Y. Supp. 229. An action will not be referred where the right to the account depends upon a finding of fraud alleged to have been practiced upon the defendant. *Tapscott v. Knowlton*, 6 State Rep. 539, 26 Wkly. Dig. 290.

⁶⁶ *Rowland v. Rowland*, 141 N. Y. 485.

⁶⁷ *Keller v. Payne*, 51 Hun, 316, 4 N. Y. Supp. 227.

⁶⁸ *National Shoe & Leather Bank v. Baker*, 148 N. Y. 581.

⁶⁹ *Cassidy v. McFarland*, 139 N. Y. 201.

⁷⁰ *Connor v. Jackson*, 53 App. Div. 322, 65 N. Y. Supp. 693; *Place v. Chesebrough*, 63 N. Y. 315. See, also, *Peabody v. Cortada*, 50 State Rep. 743, 21 N. Y. Supp. 680; *Evans v. Kalbfleisch*, 36 Super. Ct. (4 J. & S.) 450, 16 Abb. Pr. (N. S.) 13.

that it would have been proper to state it as one cause of action composed of different items.⁷¹

— **Pleadings to be considered.** It is often stated that the referability of an action depends on the complaint. This statement is misleading. The rule is true only to this extent:

1. If the complaint is based on contract and a long account is involved, the right to a reference of the cause of action cannot be defeated by an answer setting up defenses based on a tort or counterclaims which are not referable.⁷² But only the issues raised by the complaint and the denials and defenses thereto set up in the answer should be referred. Defendant is entitled to a jury trial of the issues raised by his counterclaim if they do not involve a long account.⁷³

2. If the cause of action set out in the complaint is not referable and the same is put at issue by the answer, the court has not power to order a reference without consent of parties, although the answer sets up a counterclaim involving a long account.⁷⁴ Should the counterclaim require examination, a reference can be ordered as to it after trial of the issues.⁷⁵

But where the answer sets up affirmative defenses which show that the action will involve the examination of a long account, a motion for a compulsory reference should be granted, though there is nothing in the complaint to indicate the necessity of a reference.⁷⁶ So if the defendant does not deny the cause of action but relies solely on his counterclaim which involves a long account, a reference may be ordered though the cause of action set up in the complaint is not referable.

— **Illustrations of rule as applied to particular actions.** An action in which a reference is often applied for is an ac-

⁷¹ Connor v. Jackson, 53 App. Div. 322, 65 N. Y. Supp. 693.

⁷² Welsh v. Darragh, 52 N. Y. 590.

⁷³ Hoffman House v. Hoffman House Cafe, 36 App. Div. 176, 55 N. Y. Supp. 763; McAleer v. Sinnott, 30 App. Div. 318, 51 N. Y. Supp. 956.

⁷⁴ Steck v. Colorado Fuel & Iron Co., 142 N. Y. 236; Townsend v. Hendricks, 40 How. Pr. 143; Untermeyer v. Beinhauer, 105 N. Y. 521.

⁷⁵ Id.

⁷⁶ Guaranty Trust Co. v. Robinson, 31 Misc. 277, 64 N. Y. Supp. 366; Irving v. Irving, 90 Hun, 422, 35 N. Y. Supp. 744; Haig v. Boyle, 20 Misc. 155, 45 N. Y. Supp. 816.

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tion by an attorney to recover for his services. There has been much opposition to references in such cases, and it has been urged that one lawyer ought not to pass on the bill of another lawyer.⁷⁷ There is no question, at present, however, of the power to order a reference in such a case provided a long account is actually involved,⁷⁸ but the trend of the more recent decisions is to refuse a reference in such cases unless it can plainly be seen that in consequence of the nature of the demand and of the proofs required to sustain it, it will be impracticable to try the case with a jury.⁷⁹ The real test is whether so many separate and distinct items of account will be litigated on the trial that a jury cannot keep the evidence in mind in regard to each of the items and give it the proper weight and application when they retire to deliberate on their verdict.⁸⁰ In pursuance of this rule it has been held that a compulsory reference can not be ordered where the claim was for services in four suits though the bill of particulars contained over a hundred items;⁸¹ or where there were only three separate subjects of employment but one hundred and fifty items;⁸² or where the services were rendered in one action, four mandamus proceedings, two street openings, and in drawing contracts;⁸³ or where the services embraced ten items, six of which were for consultations, one for counsel fees and consultation,

⁷⁷ *Bamberger v. Duden*, 9 State Rep. 685. See, also, *Martin v. Windsor Hotel Co.*, 10 Hun, 304.

⁷⁸ The cases refusing such reference all rest upon circumstances of discretion, or upon the ground that the action did not involve a long account. *Stebbins v. Cowles*, 30 Hun, 523, 4 Civ. Proc. R. (Browne) 302, 66 How. Pr. 28.

⁷⁹ *Watson v. Cooney*, 56 Super. Ct. (24 J. & S.) 247, 3 N. Y. Supp. 211, 18 State Rep. 880.

⁸⁰ *Spence v. Simis*, 137 N. Y. 616. Reference held properly refused in *Hoar v. Wallace*, 24 App. Div. 161, 48 N. Y. Supp. 748; *Stein v. New York News Pub. Co.*, 47 App. Div. 550, 62 N. Y. Supp. 579. Held properly granted in *Clinch v. Henck*, 49 App. Div. 183, 62 N. Y. Supp. 1058; *Lewis v. Snook*, 88 App. Div. 343, 84 N. Y. Supp. 634.

⁸¹ *Spence v. Simis*, 137 N. Y. 616.

⁸² *Fecter v. Arkenburgh*, 147 N. Y. 237.

⁸³ *Hedges v. Methodist Protestant Church*, 23 App. Div. 347, 48 N. Y. Supp. 154.

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one for drawing complaint, one for demanding property from sheriff, and one for attendance on justification of bail, and all pertaining to two matters only.⁸⁴ A reference will not be ordered if the only question is as to the value of the services,⁸⁵ nor if the services were all rendered in one action⁸⁶ or under one general retainer,⁸⁷ nor if a gross charge is made for the entire services.⁸⁸ The fact that the services consist of distinct steps and proceedings which may be stated in numerous separate items does not make the attorney's bill a long account.⁸⁹ So the making out of a bill of particulars specifying the items does not make a "long account."⁹⁰ But where plaintiff sues for services rendered under several retainers and the services claimed are numerous and complex, it is proper to refer the case.⁹¹

The same rules apply to an action by a physician to recover for his services. But a physician's action for services during a period of time when by special agreement he was to devote his entire time to the service of the defendant's testator to the exclusion of all other business so far as he might be required, and in which he bases his claim upon the per diem value of his services during such period, does not involve the examination of a long account, and is not properly referable.⁹² Other

⁸⁴ *Merritt v. Vigelius*, 28 Hun, 420.

⁸⁵ *Cantine v. Russell*, 168 N. Y. 484; *Hull v. Allen*, 4 Civ. Proc. R. (Browne) 300, 66 How. Pr. 124; *Adams v. City of Utica*, 6 Civ. Proc. R. (Browne) 294; *Flanders v. Odell*, 16 Abb. Pr. (N. S.) 247, 2 Hun, 664; *Davis v. Walsh*, 48 Super. Ct. (16 J. & S.) 515.

⁸⁶ *Randall v. Sherman*, 131 N. Y. 669; *Abbott v. Corbin*, 22 App. Div. 584, 48 N. Y. Supp. 103; *Fitch v. Volker & Felthousen Mfg. Co.*, 70 Hun, 71, 53 State Rep. 443, 23 N. Y. Supp. 1103; *Tracy v. Stearns*, 61 How. Pr. 265, 24 Hun, 662; *Benn v. First Nat. Bank*, 19 Wkly. Dig. 206.

⁸⁷ *Cantine v. Russell*, 168 N. Y. 484, which followed *Feeter v. Arkenburgh*, 147 N. Y. 237.

⁸⁸ *Martin v. Gould*, 13 Civ. Proc. R. (Browne) 45; *Van Slyck v. Ingersoll*, 13 Civ. Proc. R. (Browne) 48.

⁸⁹ *Estes v. Dean*, 1 App. Div. 35, 36 N. Y. Supp. 747; *Randall v. Sherman*, 131 N. Y. 669.

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⁹¹ *Richards v. Stokes*, 1 App. Div. 305, 37 N. Y. Supp. 246.

⁹² *Simmons v. Bigelow*, 24 State Rep. 806, 6 N. Y. Supp. 435.

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familiar examples of actions in which a compulsory reference is ordered where a long account is involved are actions for work done and materials furnished;⁹³ actions for goods sold and delivered;⁹⁴ actions for money had and received⁹⁵ where the action is based on a contract rather than a tort;⁹⁶ and actions to foreclose a mechanic's lien;⁹⁷ but an action on an in-

⁹³ *Deeves v. Metropolitan Realty Co.*, 6 Misc. 91, 55 State Rep. 399, 26 N. Y. Supp. 23; *Continental Bank Note Co. v. Industrial Exhibition Co.*, 1 Hun, 118. Where the schedule made a part of the complaint sets out a large number of items of supplies furnished for a restaurant, and of work done, during three years, entailing the examination of a long account, the answer does not relieve the plaintiff from making proof of each item, by admitting the furnishing within the dates specified of certain goods and services, where it denies all other allegations of the complaint; and a reference of the issues so raised is proper. *Hoffman House v. Hoffman House Cafe*, 36 App. Div. 176, 55 N. Y. Supp. 763. But the action will not be referred where no value was to be ascertained, that having been fixed by the contract, but performance only had to be proved. *De Graff v. MacKinley*, 38 Super. Ct. (6 J. & S.) 203.

⁹⁴ *Roberson v. Murray*, 73 Hun, 490, 26 N. Y. Supp. 480; *Canda v. Robbins*, 28 State Rep. 394, 7 N. Y. Supp. 895; *Sage v. Shepard & Morse Lumber Co.*, 76 Hun, 134, 57 State Rep. 329, 27 N. Y. Supp. 559; *Cochrane Carpet Co. v. Howells*, 86 Hun, 243, 67 State Rep. 51, 33 N. Y. Supp. 309. Reference may be ordered even though defendant admits the number and quantity but not the articles charged (*Welsh v. Darragh*, 52 N. Y. 590) or the answer counterclaims damages for breach of warranty and fraud (*Id.*). Reference refused in *Childs v. Mayer*, 24 State Rep. 343, 5 N. Y. Supp. 340 and in *Spence v. Simis*, 137 N. Y. 616.

⁹⁵ *Shipman v. Bank of New York State*, 25 State Rep. 210, 6 N. Y. Supp. 292; *City of New York v. Genet*, 4 Hun, 658, 67 Barb. 275; *People v. Wood*, 121 N. Y. 522. This is so notwithstanding unnecessary allegations of conversion in the complaint. *Town of Westchester v. Henderson*, 24 Wkly. Dig. 237; *Silver Min. Co. v. Knowlton*, 6 State Rep. 526. As to references in actions by client to recover money in hands of attorney, see *Burt v. Nafis*, 73 Hun, 574, 26 N. Y. Supp. 184 and *Paulison v. Field*, 22 Wkly. Dig. 48.

⁹⁶ Action held based on contract. *Vilmar v. Schall*, 61 N. Y. 564; *Booss v. Mihan*, 4 Misc. 614, 24 N. Y. Supp. 112; *People v. Peck*, 57 How. Pr. 315. Action held based on tort. *Willard v. Doran & Wright Co.*, 48 Hun, 402, 1 N. Y. Supp. 345, 588.

⁹⁷ *Weber v. Hearn*, 7 App. Div. 306, 40 N. Y. Supp. 273; *Tooker v. Rinaldo*, 11 Hun, 154. But a reference of proceedings to foreclose a

insurance policy will not be referred merely because the proofs of loss consist of numerous items,⁹⁸ nor will an action on a negotiable instrument merely because the consideration is attacked and many items of account go to make up the amount of the note.⁹⁹

— **Reference as matter of right.** A reference where a long account is involved is not a matter of right but rests in the discretion of the court,¹⁰⁰ which will not be interfered with by the appellate division except where clearly abused,¹⁰¹ and is not reviewable in the court of appeals.¹⁰² The judge may refuse a reference no matter how long an account will have to be examined, if, in his opinion, the ends of justice will best be promoted thereby.¹⁰³

§ 1861. Examination of long account in actions triable by the court.

The Code provides that in an action triable by the court without a jury, a reference may be made to decide the whole issue or any of the issues, or to report the referee's finding on one or more specific questions of fact involved in the issue.¹⁰⁴ This provision applies to both common law and equity

mechanic's lien must be of the whole matter. *Sheahy v. Tomlinson*, 1 Wkly. Dig. 24.

⁹⁸ *Brink v. Republic Fire Ins. Co.*, 2 T. & C. 550; *Freeman v. Atlantic Mut. Ins. Co.*, 13 Abb. Pr. 124. Contra, *Lewis v. Irving Fire Ins. Co.*, 15 Abb. Pr. 303, note; appeal dismissed 15 Abb. Pr. 140, note; *Batchelor v. Albany City Ins. Co.*, 6 Abb. Pr. (N. S.) 240, 37 How. Pr. 399, 31 Super. Ct. (1 Sweeny) 346.

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¹⁰² *Martin v. Windsor Hotel Co.*, 70 N. Y. 101.

¹⁰³ *Harris v. Aktiebolaget Separator*, 21 State Rep. 104, 4 N. Y. Supp. 126.

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actions.¹⁰⁵ It, however, must be read in connection with what precedes, and so read the rule is that only issues of fact are referable and then only where the trial will require the examination of a long account on either side and will not require the decision of difficult questions of law.¹⁰⁶ For instance, there is no authority for the ordering of a reference of the question of past damages in an action against an elevated railroad for an injunction and damages, after the easements have been acquired by direction of the court and the awards paid, since in such a case no long account is involved.¹⁰⁷ So the court cannot, where it refuses to grant a decree for specific performance, refer plaintiff's demand for damages.¹⁰⁸ In an action for an accounting, a reference should not be ordered to take and state the accounts until after it has been determined by an interlocutory judgment that the plaintiffs are entitled to an accounting.¹⁰⁹

— **Reference to report on one or more specific questions of fact.** The last clause of the Code section under consideration authorizes a reference "to report the referee's finding, on one or more specific questions of fact, involved in the issue." The question arises whether this clause applies only where the trial

National Shoe & Leather Bank v. Baker, 148 N. Y. 581. Action to foreclose a mortgage. Central Trust Co. v. New York City & N. R. Co., 18 Abb. N. C. 381, 4 State Rep. 639, 42 Hun, 602. Actions between partners for an accounting where the right to an accounting is not in issue. Streat v. Rothschild, 12 Abb. N. C. 383, 12 Daly, 95; Rutty v. Person, 12 Abb. N. C. 353; McCall v. Moschowitz, 14 Daly, 16, 10 Civ. Proc. R. 107. A reference cannot be ordered to state the interest of partners in the firm assets, but, after the interest has been ascertained, a reference to take the account is proper. Magennis v. Scheid, 72 State Rep. 432, 36 N. Y. Supp. 1030.

¹⁰⁵ Dane v. Liverpool & L. & G. Ins. Co., 21 Hun, 259.

¹⁰⁶ Thayer v. McNaughton, 117 N. Y. 111.

¹⁰⁷ Jacquelin v. Manhattan Ry. Co., 12 Misc. 330, 65 State Rep. 787, 23 N. Y. Supp. 655.

¹⁰⁸ Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 132, 60 N. Y. Supp. 739.

¹⁰⁹ Jordan v. Underhill, 71 App. Div. 559, 76 N. Y. Supp. 95; Brennan v. Gale, 14 App. Div. 396, 61 N. Y. Supp. 6; Knox v. Gleason, 63 App. Div. 59, 71 N. Y. Supp. 213. Compare Boisnot v. Wilson, 95 App. Div. 489, 88 N. Y. Supp. 867.

requires the examination of a long account and does not involve difficult questions of law. The court of common pleas has so held,¹¹⁰ and the decision was affirmed by the court of appeals which did not, however, pass on this precise point.¹¹¹ The court of appeals had previously laid down dictum that the court has power to refer one or more specific questions of fact involved in the issue, not to determine but to report upon for the information of the court, and the court is not bound by any finding or ruling of the referee in such case but can adopt the findings, or from the testimony make new ones.¹¹² It would seem that the court has no power, under this clause, to make a compulsory order directing the evidence to be taken before a referee, and the cause to be brought on for trial before the court upon the pleadings and the evidence so taken.¹¹³

— **Order of trial of issues.** Where a reference is made without the consent of the opposing party, to report upon a specific question of fact involved in the issue, and the determination of one or more other issues is necessary in order to enable the court to render judgment, they must be tried, either before or after the filing of the report, as the court directs, and either by a jury, or by the court, without a jury, as the case requires. Where they are tried by a jury, application for judgment must be made upon the verdict and the report.¹¹⁴

§ 1862. Reference of incidental questions.

The Code provides that "The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference (1) to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is

¹¹⁰ *Doyle v. Metropolitan El. R. Co.*, 1 Misc. 376, 381, 20 N. Y. Supp. 865. To same effect, *Barnes v. West*, 16 Hun, 68.

¹¹¹ *Doyle v. Metropolitan El. Ry. Co.*, 136 N. Y. 505.

¹¹² *Drexel v. Pease*, 129 N. Y. 96. See, also, *Central Trust Co. v. New York City & N. R. Co.*, 18 Abb. N. C. 381, 42 Hun, 602, 4 State Rep. 639, 25 Wkly. Dig. 520.

¹¹³ *Farmers' Nat. Bank of Malone v. Houston*, 44 Hun, 567.

¹¹⁴ Code Civ. Proc. § 1014

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necessary to do so, for the information of the court; and also (2) to determine and report upon a question of fact, arising in any stage of the action, upon a motion, or otherwise, except upon the pleadings.”¹¹⁵ References of this kind are also provided for, by special Code provisions, in various actions and special proceedings, such as partition and divorce actions, but such references will be considered in subsequent chapters except in so far as general rules applicable to all references of this kind are involved. So the right to a reference on the hearing of particular motions is provided for by many Code provisions scattered throughout the Code which have been, and will be, considered in connection with such motions.

—**Reference to take an account.** The first part of the above Code section authorizes a reference “to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court.” The words imply a power in the referee to decide, or at least to make findings, though the ultimate decision remains with the court.¹¹⁶ The clause would be clearer if the phrase “or where it is necessary to do so, for the information of the court” was omitted. It is submitted that this last phrase refers to an account but obviates the necessity of an interlocutory or final judgment as a condition precedent.

—**Reference on collateral matters.** The second part of the Code section under consideration authorizes a reference “to determine and report on a question of fact, arising in any stage of the action, on a motion, or otherwise, except on the pleadings.”¹¹⁷ This clause contains no authority to order a

¹¹⁵ Code Civ. Proc. § 1015.

¹¹⁶ *Doyle v. Metropolitan El. Ry. Co.*, 136 N. Y. 505, 510.

¹¹⁷ Reference on motion to open a default. *Martin v. Hodges*, 45 Hun, 38, 9 State Rep. 423, 27 Wkly. Dig. 47; *Dovale v. Ackermann*, 27 State Rep. 895, 7 N. Y. Supp. 833. On motion to cancel a judgment. *Dwight v. St. John*, 25 N. Y. 203; *Clark v. Brooks*, 26 How. Pr. 277. On motion to set aside a judgment. *Kinney v. Meyer*, 32 State Rep. 545, 10 N. Y. Supp. 448; *Killian v. Washington*, 2 Code Rep. 78. On motion to vacate an order of arrest. *Barron v. Sanford*, 6 Abb. Pr. 320, note, 14 How. Pr. 443; *Stelle v. Palmer*, 7 Abb. Pr. 181.

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reference "to take testimony" but only "to determine" a question of fact and report such determination to the court.¹¹⁸ Furthermore no question can be referred which arises on the pleadings. The reference must be to determine some fact that arises collaterally and not directly.¹¹⁹ For instance, the damages recoverable in an equity action against an elevated railroad company to restrain continuous trespasses constitute an issue in the case which arises on the pleadings and cannot be compulsorily referred,¹²⁰ as does the damages in an action for specific performance.¹²¹ In causes of an equitable nature, where facts "other than those presented by the issues in the pleadings" are necessary to be known to the court, in order to enable them to frame the proper decree, the court has power, not only by the Code, but as a court of equity, to order a reference for the purpose.¹²²

References of disputed questions of fact arising on motions should only be ordered in extraordinary cases, and where such such reference is absolutely necessary to determine questions of vital importance.¹²³ This clause does not authorize a reference to obtain the opinion of a referee upon questions "of law" arising upon a motion.¹²⁴ Reference of questions of fact arising on a motion are only made for the purpose of giving the parties an opportunity to cross-examine affiants and for the introduction of additional testimony on the question involved in the motion.¹²⁵

—Reference in special cases as provided for by section 827 of the Code. In another chapter of the Code, the follow-

¹¹⁸ But compare *Matter of Lord's Estate*, 81 Hun, 590, 30 N. Y. Supp. 1117; *Dean v. Driggs*, 82 Hun, 561, 31 N. Y. Supp. 548; *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. Supp. 246.

^{119, 120} *Doyle v. Metropolitan El. Ry. Co.*, 136 N. Y. 505, 511.

¹²¹ *Standard Fashion Co. v. Siegel-Cooper Co.*, 44 App. Div. 121, 132, 60 N. Y. Supp. 739.

¹²² *Elnore v. Thomas*, 7 Abb. Pr. 70.

¹²³ *Wamsley v. H. L. Horton & Co.*, 68 Hun, 549, 52 State Rep. 767, 23 N. Y. Supp. 85; *Weinberger v. Metropolitan Traction Co.*, 63 App. Div. 240, 71 N. Y. Supp. 289; *Bucholtz v. Florida East Coast Ry. Co.*, 59 App. Div. 566, 69 N. Y. Supp. 682.

¹²⁴ *Kelly v. Charlier*, 18 Abb. N. C. 416.

¹²⁵ *Woodward v. Musgrave*, 14 App. Div. 291, 43 N. Y. Supp. 830.

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ing provision is found: "Where a provision of this act authorizes the court to approve an undertaking or the sureties thereto, or to make an examination or inquiry, or to appoint an appraiser, receiver, or trustee, it may direct a reference to one or more persons designated in the order, either to make the approval, examination, inquiry or appointment, or to report the facts to the court, for its action thereupon. And where, according to the practice of the court of chancery, on the thirty-first day of December, eighteen hundred and forty-six, a matter was referable to the clerk, or to a master in chancery, a court having authority to act thereupon, may direct a reference to one or more persons, designated in the order, with the powers which were possessed by the clerk, or the master in chancery, except where it is otherwise specially prescribed by law."¹²⁶ Under this provision, a reference may be ordered in special proceedings, such as habeas corpus proceedings,¹²⁷ or contempt proceedings,¹²⁸ or on the application of creditors for the removal of an assignee,¹²⁹ or on a petition to compel an attorney to pay over money collected and property withheld,¹³⁰ or on an application for substitution of attorneys,¹³¹ or in mandamus proceedings.¹³² But it seems that the latter clause does not authorize a compulsory order to merely take testimony to be used on a trial before the court.¹³³

ART. III. PROCEDURE TO PROCURE AND ORDER.**§ 1863. Motion.**

Either party may make the motion or the court may order

¹²⁶ Code Civ. Proc. § 827.

¹²⁷ *People ex rel. Keator v. Moss*, 6 App. Div. 414, 39 N. Y. Supp. 690; *Matter of Dixon*, 11 Abb. N. C. 118, 4 Month. Law Bul. 84.

¹²⁸ *Davies v. Davies*, 20 Abb. N. C. 170.

¹²⁹ *Matter of Mellen*, 45 State Rep. 349, 18 N. Y. Supp. 515.

¹³⁰ *Taylor Iron & Steel Co. v. Higgins*, 49 State Rep. 645, 20 N. Y. Supp. 746.

¹³¹ *Doyle v. City of New York*, 26 Misc. 61, 56 N. Y. Supp. 441.

¹³² Reference may be ordered irrespective of any power conferred by statute. *People ex rel. Del Mar v. St. Louis & S. F. Ry. Co.*, 19 Abb. N. C. 1, 44 Hun, 552, 7 State Rep. 415.

¹³³ *Farmers' Nat. Bank v. Houston*, 44 Hun, 567.

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a reference of its own motion.¹³⁴ If the reference is interlocutory, it is often provided for by an interlocutory judgment, without any special motion therefor, as where the reference is to take an account.

The motion should ordinarily be made at special term.¹³⁵ The right to move at a trial term can exist only when the cause is on the calendar ready for trial, and the object is to prevent its being then tried.¹³⁶ The reference of a cause pending in a county court may be ordered by that court.¹³⁷

—**Time for motion.** All the issues cannot be referred until the summons has been served on the defendants,¹³⁸ and there has been a joinder of issues,¹³⁹ though a motion to refer may be made immediately on joinder of issue without waiting to see if an amended pleading will be served as of course.¹⁴⁰ The question of laches is seldom presented. In an equitable action, a reference may be ordered at any stage of the case when it becomes manifest that to do so will serve the ends of justice.¹⁴¹ A motion to refer incidental questions may be made during the trial or even after interlocutory or final judgment though such references are generally ordered of the court's own motion either on the trial or by a provision in the decision. And a trial judge does not lose the power to order a reference and to name the referee by omitting to do it in the decision, so long as the decision clearly and evidently contemplates the stating of an account between the parties, and a judgment appointing a referee strictly carries out the decision made.¹⁴² Noticing

¹³⁴ Code Civ. Proc. §§ 1013, 1015.

¹³⁵ *Scudder v. Snow*, 29 How. Pr. 95. Practice in first department, see *Dickinson v. Earle*, 31 App. Div. 236, 52 N. Y. Supp. 615.

¹³⁶ *Wheeler v. Falconer*, 30 Super. Ct. (7 Rob.) 45, 48.

¹³⁷ *Coy v. Rowland*, 40 How. Pr. 385.

¹³⁸ *Goodyear v. Brooks*, 27 Super. Ct. (4 Rob.) 682, 2 Abb. Pr. (N. S.) 296; *Hawkins v. Avery*, 32 Barb. 551.

¹³⁹ *Kimbel v. Mason*, 61 Hun, 337, 40 State Rep. 646, 16 N. Y. Supp. 72; *Jansen v. Tappen*, 3 Cow. 34. The order should not be granted without an inspection of the pleadings. *Cuthbert v. Hutchins*, 7 App. Div. 251, 40 N. Y. Supp. 277.

¹⁴⁰ *Enos v. Thomas*, 4 How. Pr. 290.

¹⁴¹ *Rutty v. Person*, 49 Super. Ct. (17 J. & S.) 55.

¹⁴² *Zapp v. Miller*, 109 N. Y. 51, 57.

the case for trial at a trial term does not waive the right to move for a reference.¹⁴³

—**Motion papers.** The referability of an action is not to be determined by the pleadings alone but the fact that the examination of a long account will be required may be established by affidavits.¹⁴⁴ The order should not, however, be granted, merely on affidavits without an inspection of the pleadings.¹⁴⁵ The moving papers must show that an account is necessarily involved,¹⁴⁶ and also that the account is a long account.¹⁴⁷ Ordinarily it is not sufficient to merely allege the conclusion that the trial requires the examination of a long account,¹⁴⁸ but such an affidavit may be sufficient where it is not contradicted,¹⁴⁹ though it is not conclusive of the fact even where uncontradicted.¹⁵⁰ The affidavit must state that issue is joined,¹⁵¹ but need not state the place of trial,¹⁵² though it is customary to do so. It is not necessary to allege in the moving affidavits that no difficult question of law is involved, though if such an allegation is made it is immaterial that it is made by the plaintiff who is not a lawyer where the character of the action appears from the papers.¹⁵³ The affidavit should state that no previous application has been made for the order if the application is *ex parte*.¹⁵⁴

The affidavit must be made by the party unless his omission

¹⁴³ *Hong Kong & S. Banking Co. v. Seely*, 7 State Rep. 496.

¹⁴⁴ *De Graff v. Mackinley*, 38 Super. Ct. (6 J. & S.) 203; *Crawford v. Canary*, 28 App. Div. 135, 50 N. Y. Supp. 874. The pleadings must be considered as they stand. *Simmons v. Bigelow*, 53 Hun, 637, 6 N. Y. Supp. 435.

¹⁴⁵ *Cuthbert v. Hutchins*, 7 App. Div. 251, 40 N. Y. Supp. 277.

¹⁴⁶ *Kain v. Delano*, 11 Abb. Pr. (N. S.) 29.

¹⁴⁷ *Bates v. Eagleton Mfg. Co.*, 10 Civ. Proc. R. (Browne) 218.

¹⁴⁸ *Brown v. Miller*, 1 Barb. 24; *Knope v. Nunn*, 75 Hun, 287, 58 State Rep. 217, 26 N. Y. Supp. 1074.

¹⁴⁹ *Poor v. Bowen*, 3 T. & C. 759, 1 Hun, 122.

¹⁵⁰ *Evans v. Kalbfleisch*, 36 Super. Ct. (4 J. & S.) 450, 458, 16 Abb. Pr. (N. S.) 13; *Untermeyer v. Beinhauer*, 105 N. Y. 521.

¹⁵¹ *Jansen v. Tappen*, 3 Cow. 34; *Dutcher v. Wilgus*, 2 How. Pr. 180.

¹⁵² *Cleveland v. Strong*, 2 Cow. 448; *Feeter v. Harter*, 7 Cow. 478.

¹⁵³ *Millen v. Fogg*, 37 State Rep. 366, 13 N. Y. Supp. 614.

¹⁵⁴ *Walter v. F. E. McAllister Co.*, 33 Misc. 562, 68 N. Y. Supp. 952.

to make it is excused,¹⁵⁵ but the affidavit as to the time of joining issues and the place of trial may be made by his attorney.¹⁵⁶

Where a compulsory reference is ordered, the parties may stipulate that in case the motion is granted the reference shall be to a certain named person, but where such a stipulation is made a part of the moving papers the moving affidavits should state that no party is an infant.

— **Form of affidavit.**

[Title of action.]

[Venue.]

A. X., being duly sworn, says:

I. That he is the plaintiff [or defendant] in the above action.

II. That the above action is brought to recover [state briefly the cause of action].

III. That issue was joined on the ——— day of ——— by the service of ———.

IV. That defendant's answer [or plaintiff's reply] alleges [here state defense].

V. That the trial of the issue raised by the aforesaid pleadings will require the examination of a long account on the side of ——— which will consist of at least ——— items of charges [here state any further facts showing that a long account will be involved, as by showing dates, services, separate contracts, etc.].¹⁵⁷

[Jurat.]

[Signature.]

— **Opposing papers.** Counter-affidavits may be filed to show either that no account is involved, or that the account involved is not a long one, or that the account is only collaterally involved, or that the action is not founded on contract, or that difficult questions of law will be involved. The opposing party must show that difficult questions of law will arise, since the presumption is that such questions will not arise,¹⁵⁸ by clearly and distinctly stating what the points of law are,¹⁵⁹ so as to

¹⁵⁵ Wood v. Crouner, 4 Hill, 548; Mesick v. Smith, 2 How. Pr. 7; Ross v. Beecher, 2 How. Pr. 157; Little v. Bigelow, 2 How. Pr. 164.

¹⁵⁶ Holmes v. Bennett, 28 How. Pr. 289.

¹⁵⁷ If the affidavit is made by an attorney, a clause should be added stating why the affidavit is not made by the party.

¹⁵⁸ Barber v. Cromwell, 10 How. Pr. 351; Dewey v. Field, 13 How. Pr. 437.

¹⁵⁹ Lusher v. Walton, 1 Caines, 150, Col. & C. Cas. 206; Salisbury v.

enable the court to determine whether they are of real difficulty.¹⁶⁰

— Form of affidavit where difficult questions of law are involved.

[Title of action.]

[Venue.]

A. X., being duly sworn, says:

I. That he is the plaintiff [or defendant] in the above action.

II. That he has fully and fairly stated the case to ———, his attorney, who resides at No. ——— street in the city of ———, and that the trial of this action will involve the decision of a difficult question of law, as he is advised by said counsel, after such statement made as aforesaid, and verily believes.

III. That on the trial of this case [here state specifically what questions of law will arise].

[Jurat.]

[Signature.]

§ 1864. Hearing and determination.

If the motion is opposed by counter-affidavits, the question is to be determined by a consideration of all the affidavits and the pleadings. And, as already stated, the court may refer to the pleadings to determine whether a long account is involved notwithstanding there are no counter-affidavits. The motion should be refused where the adverse party stipulates to admit the correctness of the account,¹⁶¹ but not merely because the action has once been tried by a jury,¹⁶² nor because issues have been framed for trial by a jury,¹⁶³ nor because the opposing party intends to apply for a trial of the issues by jury,¹⁶⁴ nor

Scott, 6 Johns. 329; Patterson v. Stettauer, 39 Super. Ct. (7 J. & S.) 413; Cass v. Cass, 61 Hun, 460, 41 State Rep. 36, 16 N. Y. Supp. 229.

¹⁶⁰ Hibbard v. Commercial Alliance Life Ins. Co., 4 Misc. 422, 53 State Rep. 517, 24 N. Y. Supp. 332; George F. Lee Coal Co. v. Meeker, 43 Misc. 162, 88 N. Y. Supp. 190.

¹⁶¹ Mullin v. Kelly, 3 How. Pr. 12; Seigel v. Heid, 36 How. Pr. 506; Day v. Jameson, 49 Super. Ct. (17 J. & S.) 373; McAndrew v. Place, 5 Hun, 285.

¹⁶² Brown v. Bradshaw, 8 Super. Ct. (1 Duer) 635, 8 How. Pr. 176.

¹⁶³ Roslyn Heights Land & Imp. Co. v. Burrowes, 76 Hun, 62, 59 State Rep. 609, 27 N. Y. Supp. 622.

¹⁶⁴ Goodyear v. Brooks, 27 Super. Ct. (4 Rob.) 682, 2 Abb. Pr. (N. S.) 296.

because plaintiff is insolvent and cannot pay referee's fees and the action is brought in bad faith.¹⁶⁵ Entire failure to serve a copy of an account mentioned in a pleading, when demanded, is a sufficient answer to plaintiff's motion for reference on the ground that the action involves a long account, though the rule is otherwise where an insufficient copy is served.¹⁶⁶

— **Burden of proof.** The burden is upon the party applying for a reference to show by satisfactory proof that the case is within the excepted class, i. e., that it is necessary to examine a long account.¹⁶⁷

§ 1865. Order.

The order is the authority from which the right of the referee to act proceeds. It should therefore be so explicit as to enable the referee to clearly understand the nature and extent of the reference.¹⁶⁸ Oftentimes the order takes the form of a direction in an interlocutory judgment. The order may require the referee (1) to "decide" the whole issue of fact, or (2) to "decide" a part of the issues of fact on a trial, or (3) to "report" the referee's findings on one or more specific questions of fact involved in the issues, or (4) to take an account and "report" to the court, either with or without the testimony, or (5) to "determine and report" on a question of fact not arising on the pleadings, or (6) to report the facts as authorized by section 827 of the Code. If the order is to hear and determine the whole issues, the words "hear and determine" should be used, but an order referring "the case" sufficiently indicates that the "whole issue" is referred.¹⁶⁹ However, an order in an action for divorce appointing a referee "with power to take the testimony and report the same with his findings of fact to the court" is, though badly expressed, a

¹⁶⁵ Place v. Chesebrough, 4 Hun, 577.

¹⁶⁶ Schulhoff v. Co-operative Dress Ass'n, 3 Civ. Proc. R. (Browne) 412.

¹⁶⁷ Cassidy v. McFarland, 139 N. Y. 201.

¹⁶⁸ See Walter v. F. E. McAllister Co., 33 Misc. 562, 68 N. Y. Supp. 952.

¹⁶⁹ Renouil v. Harris, 4 Super. Ct. (2 Sandf.) 641.

Art. III. Procedure to Procure and Order.—Order.

reference to hear and determine.¹⁷⁰ If the reference is of only a part of the issues, the order should clearly indicate the precise issues referred.

If the reference is merely to report on one or more questions of fact, or to take an account, i. e., an interlocutory reference, the order usually states that it appears to the court that a reference is necessary for the information of the court or to enable the court to render judgment. The phrase "that the court being desirous of being advised on the facts," etc., is sufficient where the reference is made on the hearing of a motion.¹⁷¹ But an order referring a question of fact arising on a motion should not direct the referee to "determine" the matters arising on the motion but should direct him to hear the proofs and to report the same with his opinion.¹⁷² On a reference of incidental matters, the court has the authority to control the proceedings by its order.¹⁷³ For instance, it may direct the order in which the persons to be examined shall be produced before the referee.¹⁷⁴ So it is customary for the order to contain a provision as to the bringing on of the hearing and the length of the notice, and to direct that the parties produce before the referee all deeds, books, and papers and writings in their custody or power relating to the matter of reference, and that parties be examined as the referee shall direct.¹⁷⁵ An order of reference which directs the referee to take proof as to the terms and conditions of a transaction, and to report the same, together with the testimony, to the court, does not confine him to taking and submitting the testimony, but he should find and report the fact.¹⁷⁶

The order should not grant further or other relief than that sought in the notice of motion.¹⁷⁷ The court has power to direct a reference of "a question of fact" to proceed on two

¹⁷⁰ *McCleary v. McCleary*, 30 Hun, 154; *Matthews v. Matthews*, 53 Hun, 244, 6 N. Y. Supp. 589. To same effect, *Goodrich v. Goodrich*, 21 Wkly. Dig. 264.

¹⁷¹ *Burnett v. Snyder*, 41 Super. Ct. (9 J. & S.) 342.

¹⁷² *Rovnianek v. Kossalko*, 61 App. Div. 486, 70 N. Y. Supp. 36.

^{173, 174} *Stubbs v. Ripley*, 39 Hun, 620.

¹⁷⁵ 2 Barb. Ch. Pr. 408.

¹⁷⁶ *Goodridge v. New*, 18 How. Pr. 189.

¹⁷⁷ *Walter v. F. E. McAllister Co.*, 33 Misc. 562, 68 N. Y. Supp. 952.

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days' notice,¹⁷⁸ but the order should not deprive a party of the usual notice of trial on a reference of "the issues."¹⁷⁹ Power may be given the referee to hear the evidence in any county.¹⁸⁰ But the order should not make the referee a receiver with power to carry his decision into effect without confirmation of his report by the court.¹⁸¹ If the reference is interlocutory, the order may direct the referee to report to the court the allowances for costs which should be made to the various parties out of the fund.¹⁸²

— **Form of order of reference of issues.**

The above-entitled cause having been regularly on the calendar for trial at the above term, and application having been made to the court to refer the same, on the ground that the action is one in which a compulsory reference may be ordered, and that the issues therein will involve the examination of a long account:

Now, on reading and filing the affidavits of ———, and after hearing ———, and on motion of ———:

Ordered, that said motion be granted and that said action be and the same is hereby referred to ———, of ———, who is hereby appointed referee to hear, try, and determine the same and the several issues between the parties thereto.¹⁸³

— **Form of order on interlocutory reference to state an account.**

On reading and filing the affidavits of ———, and on all the pleadings and proceedings in this cause:

Ordered, that the case be referred to ——— to take and state an account of all dealings between said plaintiff and defendant, relating to [state matters as to which account is to be taken], and for the purpose of taking said account, the parties are directed to produce before said referee all books, papers, documents and writings in their custody or under their control having reference thereto; that the said parties

¹⁷⁸ *Stubbs v. Ripley*, 39 Hun, 620.

¹⁷⁹ *Cuthbert v. Hutchins*, 7 App. Div. 251, 40 N. Y. Supp. 277.

¹⁸⁰ *O'Brien v. Catskill Mountain R. Co.*, 32 Hun, 636; *Pierce v. Voorhees*, 3 How. Pr. 111.

¹⁸¹ *Fisher v. Hubbell*, 1 Hun, 610; *Fisher v. Banta*, 4 T. & C. 691.

¹⁸² The report as to costs is merely a recommendation. *Pierson v. Drexel*, 11 Abb. N. C. 150.

¹⁸³ The order may also grant leave to the referee to sit in another county.

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may be examined in reference thereto in such manner as the referee shall direct. The said referee shall make all just allowances to the parties as between themselves, and state what, from said account, appears to be due from one party to the other, and shall also state his reasons for the allowance or disallowance of any claim of each against the other [insert any other directions deemed necessary. If the account is to be taken before trial, add] and on the coming in of said report either party may bring the case to trial.

And it is further ordered that the question of costs and all other questions are reserved until the coming in of said report and the final hearing of this cause.¹⁸⁴

— **Who may make.** The order can be made only by the court.¹⁸⁵

— **Entry and service.** The order should be entered and a copy served on the opposing party and the person appointed referee,¹⁸⁶ though the entry and service of the order of reference is not required to give the referee jurisdiction where an order has actually been made.¹⁸⁷ An entry in the clerk's minutes containing an order of reference is sufficient evidence of the order,¹⁸⁸ though a memorandum "refer to ——," made by the judge on his calendar, is not sufficient to constitute an order.¹⁸⁹

— **Provision as to costs.** Costs of a motion for a reference should be made to abide the event.¹⁹⁰

— **Amendment.** The order may be amended like any other order. For instance, an order may be amended nunc pro tunc where the stipulation was to hear and determine the issues, but the order was erroneously made to take testimony.¹⁹¹ But after entry of the order, the judge has no power to change the name of the referee except on notice and by another order.¹⁹²

¹⁸⁴ This form is taken from Poor on Referees, p. 250.

¹⁸⁵ Code Civ. Proc. §§ 1013, 1015.

¹⁸⁶ Service of order on opposing party not necessary if he has notice. *Moffat v. Judd*, 1 How. Pr. 194.

¹⁸⁷ *Eighmy v. People*, 79 N. Y. 546.

¹⁸⁸ *Gerity v. Seeger & Guernsey Co.*, 163 N. Y. 119.

¹⁸⁹ *Bonner v. McPhail*, 31 Barb. 106.

¹⁹⁰ *Cuthbert v. Hutchins*, 7 App. Div. 251, 40 N. Y. Supp. 277.

¹⁹¹ *Bliss v. Bliss*, 11 Civ. Proc. R. (Browne) 94, 13 Daly, 489.

¹⁹² *Amberg v. Kramer*, 32 State Rep. 177, 10 N. Y. Supp. 302.

— **Vacation.** The order may, in a proper case, be vacated on motion or it may be vacated solely by reason of extrinsic events such as the death of a party where the action abates,¹⁹³ though the death of a party does not vacate the order if his successor is substituted.¹⁹⁴ An amendment of the complaint changing the cause of action does not necessarily impair the order of reference.¹⁹⁵ The order of reference is not affected by the death of the referee.¹⁹⁶ So the reversal of a judgment on the referee's report and the granting of a new trial does not of itself vacate the order of reference.¹⁹⁷ But where defendant's offer of judgment has been accepted, he cannot continue the reference merely to vindicate himself from charges made in the attachment papers.¹⁹⁸ A compulsory order may be vacated at any time before final decree on the ground that the case was not a referable one.¹⁹⁹ So a motion to vacate should be granted where one of the plaintiffs has died pending suit but an order of reference was entered by consent in ignorance of his death.²⁰⁰ But an order entered on consent need not be vacated merely because the referee is unable to fix a day for hearing within the time specified in the stipulation where the stipulation does not provide that the failure to fix a day should vacate the order.²⁰¹ On a reference to decide matters arising on a motion, the court may vacate the reference at any time and decide the matter itself.²⁰² The order cannot be set aside, however, until it has been entered.²⁰³ A second motion to vacate may be made on the ground that the action was not a referable

¹⁹³ *Reynolds v. Reynolds*, 5 Paige, 161.

¹⁹⁴ *Chittenango Cotton Co. v. Stewart*, 67 Barb. 423.

¹⁹⁵ *Kierstod v. Orange & Alexandria R. Co.*, 54 How. Pr. 29.

¹⁹⁶ *Devlin v. City of New York*, 9 Daly, 334.

¹⁹⁷ *Catlin v. Adirondack Co.*, 81 N. Y. 379.

¹⁹⁸ *Neely v. Munnich*, 27 Misc. 507, 58 N. Y. Supp. 316.

¹⁹⁹ *Brink v. Republic Fire Ins. Co.*, 2 T. & C. 550.

²⁰⁰ *Waters v. Manhattan Ry. Co.*, 66 Hun, 60, 49 State Rep. 194, 20 N. Y. Supp. 831.

²⁰¹ *Parkhurst v. Berdell*, 87 N. Y. 145.

²⁰² *Patten v. Bullard*, 3 State Rep. 735.

²⁰³ *Stafford v. Ambs*, 8 Abb. N. C. 237.

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one though such ground was not mentioned in the first motion.²⁰⁴

— **Collateral attack.** The order of reference cannot be attacked collaterally, as on a motion to confirm the referee's report.²⁰⁵

— **Waiver of objections.** Objections to the appointment of a referee are waived by appearing before the referee and proceeding with the reference,²⁰⁶ except where the objections relate to want of jurisdiction.²⁰⁷ So an irregularity in changing the person originally named as referee, without notice, may be waived by proceeding before the new referee, although under protest.²⁰⁸

— **Appeal.** The order is reviewable on appeal only by appealing from the order itself and not from the judgment.²⁰⁹ No appeal lies to the court of appeals unless a question is certified by the appellate division.

ART. IV. THE REFEREE.

§ 1866. Number of referees.

Where the court is authorized to appoint a referee, it may, in its discretion, appoint either one or three. And where a reference is made by consent of the parties, they may select any number of referees, not exceeding five.²¹⁰ More than one referee should not be appointed where there is nothing peculiar about the nature of the action and the defense,²¹¹ nor where

²⁰⁴ *Brink v. Republic Fire Ins. Co.*, 2 T. & C. 550.

²⁰⁵ *Chase v. Chase*, 44 State Rep. 766, 19 N. Y. Supp. 268.

²⁰⁶ *Brown v. Brown*, 27 Super. Ct. (4 Rob.) 688, 31 How. Pr. 481; *Renouil v. Harris*, 4 Super. Ct. (2 Sandf.) 641, 2 Code Rep. 71; *Bloom v. National United Ben. Sav. & Loan Co.*, 81 Hun, 120, 62 State Rep. 657, 1 Ann. Cas. 26, 30 N. Y. Supp. 700; *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293, 24 How. Pr. 1; *McCall v. Moschcowitz*, 14 Daly, 16, 1 State Rep. 99, 10 Civ. Proc. R. (Browne) 107.

²⁰⁷ *Doyle v. Metropolitan El. R. Co.*, 29 Abb. N. C. 272, 1 Misc. 376, 49 State Rep. 118, 20 N. Y. Supp. 865; *Crumbie v. Manhattan Ry. Co.*, 83 Hun, 1, 64 State Rep. 96, 31 N. Y. Supp. 497.

²⁰⁸ *Amberg v. Kramer*, 32 State Rep. 177, 10 N. Y. Supp. 302.

²⁰⁹ *Roslyn Heights Land & Improvement Co. v. Burrowes*, 22 App. Div. 540, 48 N. Y. Supp. 15.

²¹⁰ Code Civ. Proc. § 1025.

the motion is made after the original order of reference to one referee has been affirmed upon appeal and it appears that similar applications, made when the order of reference was granted, and on a subsequent motion for the appointment of a referee or referees in place of a referee failing to serve were refused on each occasion; and where no additional or controlling facts are shown, but the circumstances of the case remain precisely the same.²¹²

§ 1867. Who may be appointed.

A referee, like a juror, should be one who can act fairly and impartially as between the parties. The Code provides that a referee appointed by the court must be free from all just objections, and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation. A judge cannot be appointed a referee, in an action brought in the court of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee.²¹³ The Constitution provides that neither a judge of the court of appeals nor a justice of the supreme court nor any county judge or surrogate elected in a county having a population exceeding one hundred and twenty thousand shall act as referee.²¹⁴ By Laws 1905, c. 435, a clerk or stenographer of any judge of a court of record is disqualified, in the first and second judicial districts. The general rules of practice provide that except where the reference is by consent, no person, unless he is an attorney of the courts in good standing, shall be appointed sole referee for any purpose in any pending action or proceeding.²¹⁵ Nor shall any person be appointed a referee who is the partner or clerk of

²¹¹ *North v. Platt*, 30 Super. Ct. (7 Rob.) 207.

²¹² *Devlin v. City of New York*, 11 Daly, 363. Same case, see 63 How. Pr. 206.

²¹³ Code Civ. Proc. § 1024. A commissioner of appeals is not a judge. *Settle v. Van Evrea*, 49 N. Y. 280.

²¹⁴ Const. art. 6, § 20; *Heerdegen v. Loreck*, 17 App. Div. 515, 45 N. Y. Supp. 585; *Countryman v. Norton*, 21 Hun, 17.

²¹⁵ Rule 79 of the General Rules of Practice.

§ 1870. Appointment of new referee.

Where the referee agreed on refuses to serve, or is removed, the court must appoint another referee, on the application of either party, unless the reference is by consent and the stipulation expressly provides otherwise;²³⁰ and where two of the three referees appointed pursuant to stipulation decline to serve, the like procedure is to be adopted.²³¹ A motion for an order appointing a new referee in the place of one who has resigned should be addressed to the court which appointed the original referee and not to one of the justices thereof.²³² Where a referee dies, a successor may be appointed who may state on information and belief what was done by his predecessor and thus save the expense and inconvenience of a new proceeding.²³³ Where a referee becomes disqualified by reason of his election as judge of the supreme court, the court cannot require, on the substitution of a new referee, that the evidence taken shall stand and be considered as though originally produced before the new referee;²³⁴ though after the expiration of his term of office, where there has been no substitution, the reference may be continued by him at the point at which he left it.²³⁵ Defendant may have the cause dismissed for want of prosecution where the plaintiff, who has the affirmative, fails to act, when the referee refuses to proceed without payment of fees.²³⁶

— **After reversal on appeal.** A new referee should not be appointed where the judgment entered on the referee's report

²³⁰ *May v. Moore*, 24 Hun, 351.

²³¹ *Hustis v. Aldridge*, 144 N. Y. 508.

²³² *Brady v. Kennedy*, 65 App. Div. 190, 72 N. Y. Supp. 507.

²³³ *Maybee v. Maybee*, 22 Abb. N. C. 465, note, 6 N. Y. Supp. 575. Procedure where one of three dies. *Westbrook v. Dubois*, 3 How. Pr. 26.

²³⁴ *Heerdegen v. Loreck*, 17 App. Div. 515, 79 State Rep. 585, 4 Ann. Cas. 297, 45 N. Y. Supp. 585.

²³⁵ *Countryman v. Norton*, 21 Hun, 17.

²³⁶ *Ellsworth v. Brown*, 16 Hun, 1.

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is reversed on appeal, unless otherwise specially provided for,²³⁷ except where the reference is by consent.²³⁸

§ 1871. Termination of powers.

The power of the referee is at an end when he files or delivers his report.²³⁹ Thereafter he cannot proceed further in the taking of testimony looking to, or which might result in, a change of his decision; and the special term cannot restore such power and much less can it compel its exercise.²⁴⁰

ART. V. PROCEEDINGS ON REFERENCE.

(A) REFERENCE TO HEAR AND DETERMINE ISSUES.

§ 1872. General considerations.

The practice on a trial before a referee is very similar to that on a trial by the court without a jury. The orderly procedure is for the referee to give notice of the time and place of hearing which should be accompanied by or followed with service of a notice of trial. Witnesses are subpoenaed as in other trials. On the day set for hearing both parties should appear. If either party desires an adjournment, a motion should be made before the referee. The case is opened by a statement by counsel.²⁴¹ Then the witnesses are produced and sworn and the trial proceeds just as if it was a trial by the court. When the evidence is closed, the attorneys make their arguments whereupon the referee takes the case under advisement. He generally delivers his report within sixty days.

²³⁷ See *Catlin v. Adirondack Co.*, 81 N. Y. 379; *Klein v. Continental Ins. Co.*, 62 Hun, 341, 42 State Rep. 207, 17 N. Y. Supp. 218.

²³⁸ See ante, § 1858.

²³⁹ *Guinan v. Guinan*, 40 App. Div. 137, 57 N. Y. Supp. 614; *Trufant v. Merrill*, 6 Abb. Pr. (N. S.) 462, 37 How. Pr. 531, 31 Super. Ct. (1 Sweeny) 462.

²⁴⁰ *McCready v. Farmers' Loan & Trust Co.*, 79 Hun, 241, 29 N. Y. Supp. 361; *Union Bag & Paper Co. v. Allen Bros. Co.*, 94 App. Div. 595, 88 N. Y. Supp. 368.

²⁴¹ Irrelevant remarks are not ordinarily ground for reversal. *Shepard v. New York El. R. Co.*, 39 State Rep. 430, 15 N. Y. Supp. 175.

§ 1873. Order as authority of referee.

A referee should not proceed without a certified copy of the order of reference in his possession,²⁴² but the effect of proceeding without a certified copy of the order of reference is merely to subject the referee to possible personal liability for his improper or erroneous assumption of power, and does not constitute legal error.²⁴³

§ 1874. Oath of referee.

A referee must, before proceeding to hear the testimony, except where the oath is waived, be sworn to faithfully and fairly try the issues, or to determine the questions referred to him, as the case requires, and to make a just and true report, according to the best of his understanding.²⁴⁴ The presumption is that the referee took the oath of office where the papers do not show the fact.²⁴⁵

— **Who may administer.** The oath may be administered by any one who may take an oath or affidavit.²⁴⁶ But the fact that the referee is sworn before the attorney for one of the parties to the action does not affect the report or judgment.²⁴⁷

— **Express waiver.** Where all the parties, whose interests will be affected by the result, are of age, and present, in person or by attorney, they may expressly waive the referee's oath by a written or oral stipulation. If it is oral, it must be entered in the referee's minutes.²⁴⁸

— **Effect of failure to be sworn.** In a court of record where a report has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be im-

²⁴² Bonner v. McPhail, 31 Barb. 106.

²⁴³ Gerity v. Seeger & Guernsey Co., 163 N. Y. 119.

²⁴⁴ Code Civ. Proc. § 1016.

²⁴⁵ Hatfield v. Malcolm, 71 Hun, 51, 53 State Rep. 863, 23 Civ. Proc. R. (Browne) 197, 24 N. Y. Supp. 596.

²⁴⁶ Code Civ. Proc. § 1016.

²⁴⁷ Katt v. Germania Fire Ins. Co., 26 Hun, 429.

²⁴⁸ Code Civ. Proc. § 1016.

paired or affected by reason of an omission on the part of the referee to be sworn.²⁴⁹

The failure to be sworn is a mere irregularity which is waived by proceeding with the reference without objection, except where there are infant parties, or parties not present in person or by counsel;²⁵⁰ but an appearance by defendant before the referee for the purpose of objecting to proceeding on the ground that an appeal had been taken is not a waiver of the objection that the referee failed to take the oath.²⁵¹

— **Form of oath.**

[Title of action.]

[Venue.]

I, ———, the referee appointed by an order of this court, made and entered in the above-entitled action, bearing date the ——— day of ———, 190—, to ———, do solemnly swear that I will faithfully and fairly determine the questions referred to me, and make a just and true report thereon, according to the best of my understanding.

[Jurat.]

§ 1875. **Bringing on case.**

The trial, by a referee, of an issue of fact or of an issue of law, must be brought on upon like notice, and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner, as where the trial is by the court without a jury.²⁵²

— **Notice of time and place of hearing.** The better practice is for the referee to appoint, in writing, a time and place for the hearing of the case and serve a copy with or before the notice of trial.²⁵³ Where there is more than one referee,

²⁴⁹ Code Civ. Proc. § 721, subd. 12.

²⁵⁰ *Nason v. Ludington*, 8 Daly, 149, 56 How. Pr. 172. The case of *Matter of Vilmar*, 10 Daly, 15, seems to hold, however, that a waiver can only be established by the minutes of the referee. *Whalen v. Albany County Sup'rs*, 6 How. Pr. 278.

²⁵¹ *Browning v. Marvin*, 5 Abb. N. C. 285.

²⁵² Code Civ. Proc. § 1018.

²⁵³ *Stephens v. Strong*, 8 How. Pr. 339; *Sage v. Mosher*, 17 How. Pr. 367.

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a majority may appoint a time and place for the trial.²⁵⁴ A mistake of the referee in informing a party that he has made no appointment for the day referred to in the written notice of trial does not excuse the failure to attend on that day.²⁵⁵

— **Form of notice of time and place of hearing.**

[Title of action.]

By virtue of an order made and entered in the above-entitled action, and bearing date the ——— day of ———, 190—, I, ———, the referee appointed thereby, do hereby summon you to appear at ——— office at ——— in the ——— on the ——— day of ———, 190—, at ——— o'clock in the ———-noon, to attend a hearing of all the matters in the said action, in reference before me, as such referee, pursuant to such order. Hereof fail not at your peril.

[Date.]

A. X.,

[Address.]

Referee.²⁵⁶

— **Notice of trial.** The trial must be brought on on like notice as if the trial was by the court without a jury,²⁵⁷ i. e., by either party serving a notice of trial at least fourteen days before the trial.²⁵⁸ It is not necessary, however, to notify a defendant who has not appeared.²⁵⁹ Either party who has served the notice may bring the issue to trial, and hence defendant, where he has noticed the cause, cannot charge delay or default on plaintiff for not bringing on the hearing.²⁶⁰

— **Form of notice of trial.**

[Title of case.]

Please take notice, that the above action will be brought on for trial before ———, the referee appointed by this court, to hear and determine the matters in controversy between the parties in the above-entitled action, at his office, number ——— in the city of ——— on the

²⁵⁴ Code Civ. Proc. § 1026.

²⁵⁵ *Sage v. Mosher*, 17 How. Pr. 367.

²⁵⁶ Below this there may be an underwriting where there are special provisions such as the production of books and papers or where the nature and extent of the reference should be more fully stated.

²⁵⁷ Code Civ. Proc. § 1018.

²⁵⁸ *Mohrmann v. Bush*, 2 Hun, 674.

²⁵⁹ *Jacobs v. Fountain*, 19 Wend. 121.

²⁶⁰ *Thompson v. Krider*, 8 How. Pr. 248; *Stephens v. Strong*, 8 How. Pr. 339.

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—— day of ——, 190—, at —— o'clock in the —— noon of that day.

[Date.]

A. X.,

[Address to opposing attorney.]

Attorney for ——.

§ 1876. Subpoenaing witnesses.

A witness may be subpoenaed to attend before a referee to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.²⁶¹

—— Form of subpoena.

The People of the State of New York, to ——, Greeting:

We command you, that all business and excuses being laid aside, you and each of you appear and attend before ——, the referee appointed by the —— court, ——, on the —— day of —— at —— o'clock, in the —— noon, at ——, to testify and give evidence in a certain action now pending in the said court, then and there to be tried between ——, plaintiff, and ——, defendant, on the part of the said ——, and for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, —— of the said court, at the ——, the —— day of ——, in the year one thousand nine hundred and ——.

Per Curiam.

[Signature of attorney.]

[Signature of referee.]

§ 1877. Place of hearing.

The hearing should take place in the county in which the action is brought unless the order permits the referee to sit in another county.²⁶² But where the parties fail to object to a referee holding hearings beyond the jurisdiction of the court, and it does not appear that the decision was not made in the jurisdiction, the proceedings are legal.²⁶³

²⁶¹ Code Civ. Proc. § 1017.

²⁶² O'Brien v. Catskill Mountain R. Co., 32 Hun, 636; Pierce v. Voorhees, 3 How. Pr. 111. Error as ground for setting aside report. Newland v. West, 2 Johns. 188.

²⁶³ Blake v. Lyon & Fellows Mfg. Co., 77 N. Y. 626; Matter of Davenport, 37 Misc. 179, 74 N. Y. Supp. 940.

§ 1878. Powers and duties.

The Code provides²⁶⁴ that on the trial of an issue of fact, the referee exercises the same power as the court in the following cases: (1) to allow amendments to the summons or to the pleadings;²⁶⁵ (2) to compel the attendance of a witness by attachment; (3) to punish a witness for contempt of court for nonattendance or refusal to be sworn or to testify; (4) to grant adjournments; (5) to preserve order and punish the violation thereof.

On a reference of all the issues, the referee takes the place of the court, and in the trial of the cause has substantially all the powers of a court at special term or circuit.²⁶⁶ On the trial of an issue of law, the referee exercises the same power as the court in the following cases: (1) to permit a party in fault to plead anew; (2) to direct the action to be divided into two or more actions; (3) to award costs, and otherwise to dispose of any question arising on the decision of the issue referred to him; (4) to grant an adjournment; (5) to preserve order and punish the violation thereof. The powers so conferred by the Code are exercised in like manner and on like terms as similar powers are exercised by the court on a trial.²⁶⁷ Where the reference is to more than one referee, a majority may decide any question which arises on the trial.²⁶⁸

A referee cannot act by proxy in the trial of a cause,²⁶⁹ and if there is more than one referee, all must actually meet together and hear the allegations and proofs though a report by a majority of them is valid.²⁷⁰ The referee should be present during the taking of evidence,²⁷¹ and evidence should not be

²⁶⁴ Code Civ. Proc. § 1018.

²⁶⁵ Defendant may withdraw a counterclaim. *Brown v. Butler*, 58 Hun, 511, 12 N. Y. Supp. 810; *Albany Brass & Iron Co. v. Hoffman*, 30 App. Div. 76, 51 N. Y. Supp. 779.

²⁶⁶ *Albany Brass & Iron Co. v. Hoffman*, 30 App. Div. 76, 51 N. Y. Supp. 779.

²⁶⁷ Code Civ. Proc. § 1018.

²⁶⁸ Code Civ. Proc. § 1026.

²⁶⁹ *Shultz v. Whitney*, 9 Abb. Pr. 71, 77, 17 How. Pr. 471.

²⁷⁰ Code Civ. Proc. § 1026; *McInroy v. Benedict*, 11 Johns. 402.

²⁷¹ *Metcalf v. Baker*, 11 Abb. Pr. (N. S.) 431, 34 Super. Ct. (2 J. & S.) 10.

taken in the absence of an attorney,²⁷² but if no objection is made to the absence of the referee²⁷³ or of the attorney²⁷⁴ until after the final submission to the referee for decision, the irregularity is waived.

A referee has no power to exclude a “party” from the trial of an action.²⁷⁵

The court may grant, to the referee in an equity case, power to compel production of books and papers.²⁷⁶ since the referee has no power himself to compel such an act,²⁷⁷ but such provision cannot be inserted where the reference is in a common-law action.²⁷⁸ A referee has no power to issue a commission to examine a witness out of the state.²⁷⁹

— **Dismissal, nonsuit, and judgment on the pleadings.** On a hearing before a referee, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited or his complaint be dismissed in like manner as upon a trial, at any time before the cause has been finally submitted to the referee for his decision. In which case the referee shall report according to the fact and judgment may thereupon be perfected by defendant.²⁸⁰ The referee is not concluded, by the order of reference, from denying the right to maintain the action.²⁸¹ He may dismiss the complaint where plaintiff neglects or refuses to bring in a necessary party,²⁸² or because it fails to state a cause of action,²⁸³ or for want of evidence,²⁸⁴

²⁷² Catlin v. Catlin, 2 Hun, 378, 4 T. & C. 664.

²⁷³ Metcalf v. Baker, 11 Abb. Pr. (N. S.) 431, 34 Super. Ct. (2 J. & S.) 10.

²⁷⁴ Catlin v. Catlin, 2 Hun, 378, 4 T. & C. 664.

²⁷⁵ Chandler v. Avery, 47 Hun, 9.

^{276, 277} Fraser v. Phelps, 6 Super. Ct. (4 Sandf.) 682.

²⁷⁸ North v. Platt, 30 Super. Ct. (7 Rob.) 207.

²⁷⁹ Rathbun v. Ingersoll, 34 Super. Ct. (2 J. & S.) 211.

²⁸⁰ Rule 30 of General Rules of Practice.

²⁸¹ Erhard v. County of Kings, 69 State Rep. 624, 36 N. Y. Supp. 656.

²⁸² Peyser v. Wendt, 87 N. Y. 322.

²⁸³ Coffin v. Reynolds, 37 N. Y. 640.

²⁸⁴ Wilkins v. Buck, 13 Hun, 124; Smith v. Pelott, 44 State Rep. 242, 18 N. Y. Supp. 301, where report assumed to dispose of whole case and judgment was entered dismissing the complaint on the merits but it was held that it amounted to only a judgment of non-suit.

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or may give judgment for plaintiff on the pleadings where the answer does not contain facts constituting a defense.²⁸⁵ Where a motion for a nonsuit is made when plaintiff rests, the referee may reserve his decision until the whole case is before him,²⁸⁶ but if plaintiff submits to a nonsuit he cannot require defendant to proceed on his counterclaim.²⁸⁷

—**Administering oath to witnesses.** The referee himself should swear the witnesses. Where there is more than one referee, either of them may administer an oath to a witness.²⁸⁸

—**Admitting or rejecting evidence.** The court cannot interfere with or review the proceedings of a referee in taking testimony,²⁸⁹ and it is not proper to ask the court to instruct the referee how to rule on the admission or rejection of testimony.²⁹⁰ The referee should decide the question as to the admissibility of evidence when the evidence is offered, and he cannot reserve the question and decide it on the final disposition of the case,²⁹¹ except where the parties consent;²⁹²

²⁸⁵ Schuyler v. Smith, 51 N. Y. 309.

²⁸⁶ Hughes v. Griffith, 12 Wkly. Dig. 501. Where a motion, made to dismiss a complaint at the close of the evidence, is not passed upon by a referee at the time, and subsequently a report is made with findings of fact adverse to plaintiff, and with a finding of law that the complaint be dismissed, this cannot be considered the same as a nonsuit, but as a disposition of the case upon all the testimony. Van Derlip v. Keyser, 68 N. Y. 443.

²⁸⁷ Albany Brass & Iron Co. v. Hoffman, 30 App. Div. 76, 51 N. Y. Supp. 779.

²⁸⁸ Code Civ. Proc. § 1026.

²⁸⁹ Schermerhorn v. Develin, 1 Code R. 28; Heerdt v. Wetmore, 25 Super. Ct. (2 Rob.) 697.

²⁹⁰ Robinson v. Robinson, 4 Month. Law Bul. 70.

²⁹¹ Clussman v. Merkel, 16 Super. Ct. (3 Bosw.) 402; Peck v. Yorks, 47 Barb. 131; Waggoner v. Finch, 1 T. & C. 145; Wagener v. Finch, 65 Barb. 493; Berrian v. Sanford, 1 Hun, 625, 4 T. & C. 655. Documentary evidence. Gilman v. Healy, 46 Hun, 310. Where a referee reserves his decision upon an objection to the evidence and no ruling thereon is subsequently made, it must be treated on appeal, though it had been sustained and an exception taken. Adams v. Elwood, 176 N. Y. 106; Lathrop v. Bramhall, 64 N. Y. 365.

but failure to object to a decision at such time may constitute a waiver,²⁹³ and such irregularity is not necessarily fatal to the judgment,²⁹⁴ as where the evidence is competent,²⁹⁵ or not calculated to injure the objecting party.²⁹⁶ In short, if the rights or interests of the objecting party have not been injuriously affected by the action of the referee, the judgment should not be reversed on appeal.²⁹⁷ Improper admission of testimony is not prejudicial if, rejecting it, enough remains to support the finding.²⁹⁸

— **Striking out evidence.** The referee has power to strike out evidence before the final submission of the case,²⁹⁹ to the same extent as has the court in a trial before it; but evidence cannot be stricken out after the case has been closed and submitted unless the right to do so has been specially reserved.³⁰⁰ The direct testimony of a witness who dies during the examination can be stricken out only in so far as the direct examination has not been covered by the cross-examination,³⁰¹ and then only where the opportunity to cross-examine has been

²⁹² *Hopkins v. Clark*, 90 Hun, 4, 69 State Rep. 849, 35 N. Y. Supp. 360.

²⁹³ *Clark v. Donaldson*, 49 How. Pr. 63, 5 T. & C. 683, 3 Hun, 224.

²⁹⁴ *Lathrop v. Bramhall*, 64 N. Y. 365.

²⁹⁵ *Kerslake v. Schoonmaker*, 3 T. & C. 524, 1 Hun, 436.

²⁹⁶ *Mercer v. Vose*, 40 Super. Ct. (8 J. & S.) 218.

²⁹⁷ *Lathrop v. Bramhall*, 64 N. Y. 365.

²⁹⁸ *Kemeys v. Richards*, 11 Barb. 312.

²⁹⁹ *Marsh v. Kinney*, 11 Wkly. Dig. 144; *Kopetzky v. Metropolitan El. Ry. Co.*, 14 Misc. 311, 70 State Rep. 457, 35 N. Y. Supp. 766. Where evidence has been received by a referee conditional upon the introduction of further evidence upon which that first offered is dependent, and no motion is subsequently made to strike it out on the ground that the evidence necessary to render it competent was not subsequently introduced, it will not be assumed on appeal that such evidence was finally considered by the referee upon the merits. *Wilson v. Kings Co. El. R. Co.*, 114 N. Y. 487.

³⁰⁰ *Blashfield v. Empire State Telephone & Telegraph Co.*, 71 Hun, 532, 54 State Rep. 917, 24 N. Y. Supp. 1006, affirmed in 147 N. Y. 520; *Bloss v. Morrison*, 47 Hun, 218.

³⁰¹ *Curtice v. West*, 50 Hun, 47, 2 N. Y. Supp. 507.

lost through no fault of the moving party.³⁰² Where cross-examination of a witness before a referee is suspended under an agreement between the parties and the witness that he would be present when again called for cross-examination, his testimony should be stricken out on motion, if he fails to appear when recalled, and it is shown that he has left the state.³⁰³

— **Reopening case.** The referee may reopen the case for further evidence even after it is closed, where he has not signed or delivered his report,³⁰⁴ but whether he will do so rests in his discretion,³⁰⁵ which will not be interfered with on appeal except in case of clear abuse.³⁰⁶ He cannot refuse to open the case to receive additional evidence merely on the ground that the new evidence would not alter his conclusions, since the moving party is entitled to have all the evidence in the case for the purpose of a review on appeal.³⁰⁷ He may reopen the case of his own motion.³⁰⁸ Irregular conduct of a referee in receiving proofs and hearing an argument after the case was closed, without notice to all the parties, is waived by a party not notified who fails to make timely objection on being apprised of such irregularity.³⁰⁹

— **Amendments to summons or pleadings.** The referee has the same power as the court to allow amendments to the

³⁰² *Forrest v. Kissam*, 7 Hill, 463. See, also, *People v. Cole*, 43 N. Y. 508.

³⁰³ *Matthews v. Matthews*, 53 Hun, 244, 6 N. Y. Supp. 589.

³⁰⁴ *Moissen v. Kloster*, 114 N. Y. 638; *Decker v. O'Brien*, 13 Misc. 94, 68 State Rep. 73, 34 N. Y. Supp. 81; *Cleaveland v. Hunter*, 1 Wend. 104; *Ayrault v. Sackett*, 9 Abb. Pr. 154, note, 17 How. Pr. 461; *Kissam v. Hamilton*, 20 How. Pr. 369; *Domschke v. Metropolitan El. Ry. Co.*, 148 N. Y. 337.

³⁰⁵ *De Witt v. Monjo*, 46 App. Div. 533, 61 N. Y. Supp. 1046. Evidence not proper in rebuttal. *Fielden v. Lahens*, 2 Abb. Dec. 111, 6 Abb. Pr. (N. S.) 341; *Dow v. Darragh*, 42 Super. Ct. (10 J. & S.) 80.

³⁰⁶ *Hubbell v. Alden*, 4 Lans. 214.

³⁰⁷ *Clegg v. New York Newspaper Union*, 51 Hun, 232, 21 State Rep. 215, 4 N. Y. Supp. 280.

³⁰⁸ *Duguid v. Ogilvie*, 3 E. D. Smith, 527, 1 Abb. Pr. 145.

³⁰⁹ *McAllister v. Case*, 13 State Rep. 141.

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summons or the pleadings.³¹⁰ This power is, however, not exclusive of, but concurrent with, the power of the court, and pending such reference, if the party chooses and the referee adjourns the case, a motion to amend may be made at special term.³¹¹ Furthermore a referee has not the power in amending pleadings to do what the court may do on or after judgment in furtherance of justice.³¹² And an amendment which can only be allowed before trial such as changing the cause of action or adding another cause or adding a new defense cannot be allowed by the referee, but in such case he should suspend the trial so as to enable the party to apply at special term for the relief sought.³¹³ The referee has the power to add or strike out the name of a party,³¹⁴ but cannot order a new party to be brought in by compulsory process.³¹⁵ He may allow an amendment to the answer,³¹⁶ or may allow a new bill of particulars to be substituted for that annexed to the complaint,³¹⁷ and he has co-extensive power with the court to allow an amendment of a pleading to conform with the proof.³¹⁸ The allowance of amendments lies in the discretion of the referee,³¹⁹ as does the time and manner of the exercise

³¹⁰ Code Civ. Proc. § 1018. Power of court, see volume 1, § 903, pp. 1028-1035.

³¹¹ *Bullock v. Bemis*, 40 Hun, 623.

³¹² *Union Bank v. Mott*, 10 Abb. Pr. 372.

³¹³ *Niagara County Nat. Bank v. Lord*, 33 Hun, 557; *Sinclair v. Neill*, 1 Hun, 80, 3 T. & C. 74; *Wiley v. Brigham*, 16 Hun, 106. A motion made before a referee on the day agreed upon by the parties as the first day for the hearing of the reference must be regarded as if made at the beginning of the trial and not before the trial in so far as the power of the referee to permit an amendment of the pleadings is concerned. *Barnum v. Williams*, 91 App. Div. 464, 86 N. Y. Supp. 821.

³¹⁴ *Newman v. Marvin*, 12 Hun, 236; *Magovern v. Robertson*, 37 State Rep. 441, 14 N. Y. Supp. 114. *Billings v. Baker*, 6 Abb. Pr. 213, which holds that he can not strike out the name of a party is not the law.

³¹⁵ *Newman v. Marvin*, 12 Hun, 236.

³¹⁶ *Frazer v. Hunt*, 18 Wkly. Dig. 390; *McLaughlin v. Webster*, 141 N. Y. 76; *Chapin v. Dobson*, 78 N. Y. 74.

³¹⁷ *Melvin v. Wood*, 3 Abb. Dec. 272, 4 Abb. Pr. (N. S.) 438.

³¹⁸ *Knapp v. Fowler*, 18 Wkly. Dig. 230, 30 Hun, 512.

³¹⁹ *Haight v. Littlefield*, 71 Hun, 285, 24 N. Y. Supp. 1097; *Barnes v. Seligman*, 55 Hun, 339, 350, 29 State Rep. 68, 8 N. Y. Supp. 834.

of the power.³²⁰ The power in respect to the terms on which an amendment shall be allowed is commensurate with that of the court.³²¹ A referee may, if no objection is made, reserve his decision of motion for leave to amend and grant it when he makes his findings.³²² A decision of a referee on an application to amend a pleading is only reviewable on appeal from a judgment entered on his findings;³²³ and a motion at special term to set aside or strike out an amendment allowed by a referee is improper,³²⁴ as is a motion at special term for leave to amend where the referee has refused the application.³²⁵

— **Adjournments.** The referee exercises the same power as the court to grant adjournments. Where there is more than one referee, a majority of those present at a time and place appointed for the trial may adjourn the trial to a future day.³²⁶ Formerly it was held that the court itself might stay the proceedings before the referee on an affidavit of the absence of a material witness,³²⁷ but such is not the law at present. An adjournment should not be granted on account of the absence of counsel on a pleasure voyage,³²⁸ but may be to allow time for an application to the court to bring in a necessary party.³²⁹ That adjournments are not formally made from one

³²⁰ *McLaughlin v. Webster*, 141 N. Y. 76.

³²¹ *Smith v. Rathbun*, 75 N. Y. 122, 126; *Barnum v. Williams*, 91 App. Div. 464, 86 N. Y. Supp. 821.

³²² *Chapin v. Dobson*, 78 N. Y. 74; *Bean v. Edge*, 46 Super. Ct. (14 J. & S.) 455.

³²³ *Woodruff v. Dickie*, 28 Super. Ct. (5 Rob.) 619, 31 How. Pr. 164.

³²⁴ *Quimby v. Claffin*, 77 N. Y. 270. The supreme court at special term has no power on motion to review the decision of a referee in regard to an amendment, even where such decision is rendered "subject to the approval of the court." *Knapp v. Fowler*, 26 Hun, 200.

³²⁵ *Oregon Steamship Co. v. Otis*, 59 How. Pr. 254. The court at a special term has no power to review on motion the action of the referee in allowing or disallowing an amendment to the pleadings. *Barnum v. Williams*, 91 App. Div. 464, 86 N. Y. Supp. 821.

³²⁶ Code Civ. Proc. § 1026.

³²⁷ *Bird v. Sands*, 1 Johns. Cas. 394, *Colem. & C. Cas.* 107; *Sudam v. Swart*, 20 Johns. 476.

³²⁸ *Forrest v. Forrest*, 16 Super. Ct. (3 Bosw.) 650.

³²⁹ *Peyser v. Wendt*, 87 N. Y. 322.

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hearing to the time of another does not of itself render the proceedings irregular.³³⁰ A notice given by the referee in person to the attorney or a party that the referee could not be present at the time fixed for hearing but would examine the witnesses at an hour specified later in the day is sufficient as an adjournment to that hour.³³¹ Terms may be imposed on postponing the hearing,³³² such as payment of costs.³³³ Error of the referees in refusing to grant an adjournment may be corrected by setting aside their report,³³⁴ though the court will not ordinarily interfere with the referee's discretion as to adjournments.³³⁵ If plaintiff fails to appear and complete his evidence on an adjourned day, the referee may dismiss the complaint.³³⁶ If an adjournment is obtained after trial has commenced in order to move for leave to serve a reply, it is not error to refuse to commence the trial *de novo*.³³⁷

— **Costs.** On a reference of all the issues to hear and determine, the referee should decide the right to costs,³³⁸ except that he cannot award costs to one of several defendants who alone succeeds against plaintiff;³³⁹ and if he does not award costs the court has no power to do so.³⁴⁰ The court at

³³⁰ *Accessory Transit Co. v. Garrison*, 9 Abb. Pr. 141, 18 How. Pr. 1.

³³¹ *Matter of Ferrigan's Estate*, 42 App. Div. 1, 58 N. Y. Supp. 920.

³³² *Sickles v. Fort*, 12 Wend. 199.

³³³ *Slocum v. Watkins*, 1 Denio, 631.

³³⁴ *Forbes v. Frary*, 2 Johns. Cas. 224; *Langley v. Hickman*, 3 Super. Ct. (1 Sandf.) 681.

³³⁵ *Cooley v. Huntington*, 16 Abb. Pr. 384, note.

³³⁶ *Williams v. Sage*, Code R. (N. S.) 358; *Morange v. Meigs*, 54 N. Y. 207.

³³⁷ *White v. Smith*, 46 N. Y. 418.

³³⁸ *Graves v. Blanchard*, 4 How. Pr. 300; *Morgan v. Stevens*, 6 Abb. N. C. 356. In an action of an equitable nature, the award of costs is in the discretion of the referee. *Barker v. White*, 1 Abb. Dec. 95, 5 Abb. Pr. (N. S.) 124, 3 Keyes, 617.

³³⁹ *New York El. R. Co. v. McDaniel*, 31 Hun, 310.

³⁴⁰ *Stevens v. Weiss*, 25 Misc. 457, 55 N. Y. Supp. 562; *Kennedy v. McKone*, 10 App. Div. 97, 41 N. Y. Supp. 577; *Phelps v. Wood*, 46 How. Pr. 1; *First Nat. Bank v. Levy*, 3 State Rep. 298. This rule has also been held to apply to a reference in a divorce action where the report is expressly made subject to confirmation. *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958.

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special term cannot retax the costs.³⁴¹ But an application for an additional allowance should be made to the court and not to the referee.³⁴²

— **Punishment for contempt.** The referee has the same power as the court to preserve order and punish the violation thereof, and to punish a witness for nonattendance or a refusal to be sworn or to testify.³⁴³ An order to show cause may be made, or a warrant may be issued, as prescribed in section 2269 of the Code, by a referee appointed by the court, where the offense is committed on the trial of an issue referred to him or consists of a witness' nonattendance, or refusal to be sworn or to testify before him. The order or warrant may, in the discretion of the referee, be made returnable before him or before the court. Where it is made returnable before the referee he has all the power and authority of the court with respect to the motion or special proceedings instituted thereby.³⁴⁴ The referee and the court have concurrent jurisdiction to punish for contempt in such cases.³⁴⁵

— **Determination of issues.** In making his decision, the referee cannot exclude evidence admitted on the trial,³⁴⁶ but where such testimony is irrelevant and inadmissible "in substance" no prejudice results.³⁴⁷ And a referee who has erroneously admitted evidence or denied a motion to strike out incompetent testimony cannot ordinarily deprive the objecting party of his exception to the ruling by stating in his report that he disregarded the objectionable evidence,³⁴⁸ though he

³⁴¹ Kennedy v. McKone, 10 App. Div. 97, 41 N. Y. Supp. 577.

³⁴² Pinsker v. Pinsker, 44 App. Div. 501, 60 N. Y. Supp. 902.

³⁴³ Code Civ. Proc. § 1018; Burnett v. Phalon, 11 Abb. Pr. 157, 19 How. Pr. 530; Heerdt v. Wetmore, 25 Super. Ct. (2 Rob.) 697.

³⁴⁴ Code Civ. Proc. § 2272.

³⁴⁵ Naylor v. Naylor, 32 Hun, 228. So held where the reference was merely to take an account and report. Milton v. Richardson, 21 Misc. 380, 47 N. Y. Supp. 735.

³⁴⁶ Meyers v. Betts, 5 Denio, 81; Allen v. Way, 7 Barb. 585, 3 Code R. 243.

³⁴⁷ Brown v. Colie, 1 E. D. Smith, 265.

³⁴⁸ Dougall v. Dougall, 61 App. Div. 282, 70 N. Y. Supp. 336; Bloss v. Morrison, 47 Hun, 218, 14 State Rep. 379, 28 Wkly. Dig. 256.

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may where the referee, by consent, has viewed the premises,³⁴⁹ or where the evidence disregarded stands alone and is readily identified, and it can be seen that it had no effect on the decision.³⁵⁰ The referee decides as to the weight of the evidence,³⁵¹ and in so doing he may believe part of the testimony of a witness and reject part,³⁵² and is not bound to believe all the testimony given by a party although it is uncontradicted.³⁵³ It is the duty of the referee, where the evidence is equally balanced, to decide against the party on whom the burden of proof rests;³⁵⁴ but where there is a conflict of testimony he has no right to disregard testimony of both parties and make an independent finding based on no testimony in the case;³⁵⁵ and where there is a variance between the evidence and the pleading, he should not disregard the evidence and treat the pleading as controlling, where the evidence is given without objection.³⁵⁶ He may reject part of the testimony as untrue while accepting other parts as true.³⁵⁷ He may compare documents in evidence for the purpose of inferring the genuineness or simulation of the handwriting,³⁵⁸ and if the parties stipulate that he may inspect the premises in dispute, he may construe the testimony in the light of the information obtained by such inspection, so that no exception is available to his findings as against or without evidence.³⁵⁹ Where no question is raised before the referee as

³⁴⁹ *Blashfield v. Empire State Telephone & Telegraph Co.*, 147 N. Y. 520.

³⁵⁰ *Nette v. New York El. R. Co.*, 13 Misc. 218, 68 State Rep. 213, 34 N. Y. Supp. 233.

³⁵¹ *Hogan v. Laimbeer*, 66 N. Y. 604.

³⁵² *Stafford v. Leamy*, 34 Super. Ct. (2 J. & S.) 269, 43 How. Pr. 40.

³⁵³ *Vandercook v. City of Cohoes*, 12 Wkly. Dig. 84.

³⁵⁴ *Strong v. Place*, 27 Super. Ct. (4 Rob.) 385, 33 How. Pr. 114; *Bradley v. McLaughlin*, 8 Hun, 545.

³⁵⁵ *Heim v. Link*, 52 Super. Ct. (20 J. & S.) 547.

³⁵⁶ *Stephan v. Hughes*, 22 Wkly. Dig. 119.

³⁵⁷ *Chester v. Jumel*, 2 Silv. Sup. Ct. 182, 24 State Rep. 231, 5 N. Y. Supp. 822.

³⁵⁸ *Hunt v. Lawless*, 7 Abb. N. C. 113.

³⁵⁹ *Crouch v. Gutmann*, 32 State Rep. 254, 10 N. Y. Supp. 275.

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to the mode of trial, he is bound to grant plaintiff any relief, legal or equitable, to which his allegations and proof entitle him.³⁶⁰ Whether the minutes of the referee are correct is for him to determine, and where he has denied a motion to correct the minutes, his decision is conclusive.³⁶¹

§ 1879. Reargument.

The referee may allow a reargument before making his report even though he has made up his mind.³⁶²

(B) REFERENCE TO REPORT ON FACTS.

§ 1880. General considerations.

Having considered the procedure on a reference granted to hear and determine the issues or a part of the issues, it is necessary to now determine the practice pertaining to a reference where the reference is not to hear and determine the issues or a part of the issues but either (a) to report the referee's findings on one or more specific questions of fact involved in the issue,³⁶³ or (b) to take an account and report to the court thereon,³⁶⁴ or (c) to determine and report upon a question of fact arising at any stage of the action on a motion or otherwise except on the pleadings,³⁶⁵ or (d) to report the facts arising in a particular proceeding or where a reference to a master in chancery was proper prior to the adoption of the Code.³⁶⁶ In the same class with the references now to be considered are references of particular facts in particular actions which will be treated of in subsequent chapters pertaining to such actions. For instance, a reference in partition is provided for by a particular Code provision as is a reference in an action for divorce and a reference to compute the amount due in an action for foreclosure.

³⁶⁰ *Armitage v. Pulver*, 37 N. Y. 494.

³⁶¹ *Page v. Methfessel*, 71 Hun, 442, 25 N. Y. Supp. 11.

³⁶² *Litch v. Brotherson*, 16 Abb. Pr. 384, 25 How. Pr. 407.

³⁶³ Code Civ. Proc. § 1013.

³⁶⁴ Code Civ. Proc. § 1015.

³⁶⁵ Code Civ. Proc. § 1015.

³⁶⁶ Code Civ. Proc. § 827.

The Code lays down particular rules which define the powers and duties of a referee where the reference is to hear and determine issues, but few of those rules are applicable to references other than of the issues, and hence the practice is largely governed by the chancery practice which prevailed prior to the adoption of the Code.³⁶⁷

§ 1881. Order as authority of referee.

It is customary to deliver to, and leave with the referee, a certified copy of the order of reference for his use.³⁶⁸ The possession of the order of reference by the referee is necessary not only that he may know he has authority to execute the reference and to summon parties to appear before him, but also to enable him to exercise a proper discretion in fixing a reasonable time for service of the summons on the parties who are to attend before him, having regard for the nature of the matters to be inquired into and the residences of such parties and their attorneys.³⁶⁹

§ 1882. Bringing on hearing.

If the order does not prescribe the mode of bringing on the hearing, the practice is governed by the old chancery practice, under which the party in whose favor judgment was entered or who obtained the order was entitled to bring on the hearing.³⁷⁰ If he did not procure and serve a summons within thirty days after the order was entered, any other party or person interested in the matter of the reference could apply to the court to expedite the prosecution of the order.³⁷¹ Furthermore, if, after proceedings had been commenced by service

³⁶⁷ Rule 84 of the General Rules of Practice provides that in cases where no provision is made by statute or by these rules, the proceedings shall be according to the customary practice as it formerly existed in the court of chancery or supreme court, in cases not provided for by statute or by written rules of those courts.

³⁶⁸ *Quackenbush v. Leonard*, 10 Paige, 131.

³⁶⁹ 2 Barb. Ch. Pr. 472.

³⁷⁰ *Quackenbush v. Leonard*, 10 Paige, 131; 2 Barb. Ch. Pr. 474.

³⁷¹ 2 Barb. Ch. Pr. 475.

of summons, the party entitled to prosecute did not proceed with due diligence, the referee could, on application of any other person interested either as a party to the suit or as coming in to prove his debt or establish a claim under the decree or order, commit to him the prosecution of the reference.³⁷² The referee should not permit the party who has the prosecution of the reference to fix the time and place thereof and time of service of the summons so as to suit his own convenience only.³⁷³

— **Notice.** In the absence of any provision in the order of reference, the rules of chancery govern the procedure as to the manner of giving notice of the hearing and the sufficiency thereof. The chancery rules provided for a summons which was entitled in the cause and signed by the referee, and named a time and place for the hearing. It was usually followed by an underwriting or memorandum expressing the object of the attendance.³⁷⁴ It is not absolutely necessary that a summons should be underwritten, although the usual practice, as it is sufficient if the nature of the reference to be proceeded in, or the object of the attendance, is briefly stated in the body of the summons. But the referee, before he signs the summons, should see that it is properly underwritten or that there is sufficient appearing in the body thereof to apprise the party on whom it is served of the nature of the proceedings which are to be had before him.³⁷⁵ The underwriting need not be signed by the referee.³⁷⁶ The mode of proceeding to enforce the production and deposit of documents is by inserting in the underwriting a clause such as “at which time defendant is to produce before me and deposit in my office all such deeds, books, and papers as are in his custody or power relating to the matters referred to me.”³⁷⁷ The summons must be served on the adverse party or his attorney such time previous to the day appointed for the hearing as the

³⁷² 2 Barb. Ch. Pr. 475.

³⁷³ Quackenbush v. Leonard, 10 Paige, 131; 2 Barb. Ch. Pr. 472.

³⁷⁴ 2 Barb. Ch. Pr. 472.

³⁷⁵ Manhattan Co. v. Evertson, 4 Paige, 276.

³⁷⁶ 2 Barb. Ch. Pr. 473.

³⁷⁷ 2 Barb. Ch. Pr. 481.

referee may deem reasonable, taking into consideration the nature of the matters to be examined and the residence of the parties.³⁷⁸ The giving of too short notice is waived, however, by appearance and asking for an adjournment.³⁷⁹

§ 1883. Subpoenaing witnesses.

Witnesses may be subpoenaed to testify and, in a proper case, to bring a book, document, or other paper, as on a trial by the court.³⁸⁰

§ 1884. Procedure on hearing.

On the return of the summons, the referee should regulate the manner of executing the reference and the several steps to be taken by the respective parties, so far as it can then conveniently be done, and at any subsequent time to which the reference may be adjourned, he should give such further directions as may be proper in relation to any other proceedings which have become necessary in the progress of the reference.³⁸¹

— **Oath of referee.** The rules laid down as to the necessity of the referee being sworn, where the reference is to determine issues, apply to references now under consideration if they are embraced within section 1013 or 1015 of the Code.³⁸² The authorities are in conflict as to whether a referee to compute the amount due on default must take the oath.³⁸³ Failure to take the oath may be waived by proceeding with the reference without objecting thereto.³⁸⁴

— **Adjournments.** The referee has power to adjourn the hearings. For instance, he may adjourn the proceedings where

³⁷⁸ 2 Barb. Ch. Pr. 474. See *Matter of Ferrigan's Estate*, 42 App. Div. 1, 4, 58 N. Y. Supp. 920.

³⁷⁹ *Wetter v. Schlieper*, 7 Abb. Pr. 92, 94.

³⁸⁰ Code Civ. Proc. § 1017.

³⁸¹ *Story v. Brown*, 4 Paige, 112.

³⁸² See Code Civ. Proc. § 1016.

³⁸³ *Must. Exchange Fire Ins. Co. v. Early*, 4 Abb. N. C. 78, 54 How. Pr. 279. Need not. *McGowan v. Newman*, 4 Abb. N. C. 80.

³⁸⁴ *Keator v. Ulster & Delaware Plank Road Co.*, 7 How. Pr. 43.

the notice of the reference is deemed too short, notwithstanding the order of reference provides for bringing on the reference on two days' notice.³⁸⁵

— **Evidence.** It may safely be stated that the powers of the referee in admitting and rejecting evidence are as extensive as the powers of a referee on a reference to hear and determine issues,³⁸⁶ though there are cases holding that where the reference is merely to take evidence, the referee should take all the evidence offered and leave it to the court to rule on its admissibility.³⁸⁷ The question arises, however, as suggested by the late Judge Rumsey in his work on New York Practice,³⁸⁸ whether a reference is authorized, in any case, to merely report evidence to the court. There is no Code provision authorizing it and it is very doubtful whether such a reference is proper. It has been held that the referee has no power to strike out the testimony of a witness on his failure to appear for cross-examination,³⁸⁹ but such holding is subject to the criticism that it makes the reference merely one to take evidence.

The referee cannot receive affidavits as evidence but the witnesses must be sworn before him.³⁹⁰ The affidavits used on the motion which is the subject of the reference are not properly before the referee as evidence.³⁹¹ If the affidavits used on the motion be treated by the referee as pleadings by order of the court, then any allegation in the affidavit of the moving party not denied by the opposing party must be taken as true.³⁹² A referee, where the reference is to determine matters arising on a motion, is not authorized to permit an examination by commission of the witnesses required to be produced

³⁸⁵ *Stubbs v. Ripley*, 39 Hun, 620.

³⁸⁶ *Ayres v. Village of Hammondsport*, 13 Civ. Proc. R. (Browne) 236, 11 State Rep. 706; *Matter of Silvernail*, 45 Hun, 575, 578.

³⁸⁷ *Scott v. Williams*, 14 Abb. Pr. 70, 23 How. Pr. 393; *Fox v. Moyer*, 54 N. Y. 125, 131.

³⁸⁸ 2 Rumsey's Pr. p. 428.

³⁸⁹ *Matter of Crooks*, 23 Hun, 696.

³⁹⁰ *Security Fire Ins. Co. v. Martin*, 15 Abb. Pr. 479.

³⁹¹ *Fenlon v. Dempsey*, 21 Abb. N. C. 291.

³⁹² *Wetmore v. Wetmore*, 27 Misc. 700, 59 N. Y. Supp. 586.

before him.³⁹³ Where plaintiff has given evidence in support of her claim, defendant is not entitled to a report in his favor upon taking plaintiff's default for nonappearance at an adjourned hearing, but the referee must report the evidence taken and his opinion thereon.³⁹⁴

— **Signing testimony.** In references "other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases," the testimony of the witnesses shall be signed by them.³⁹⁵ This rule does not apply, however, to special statutory proceedings, such as an accounting of an assignor for the benefit of creditors.³⁹⁶ As to whether the omission to request the signatures is a waiver is not settled.³⁹⁷ The remedy for failure to subscribe the testimony is by a motion to correct the report and not by exceptions to the report.³⁹⁸

— **Punishment for contempt.** The referee may punish a witness for contempt in refusing to answer,³⁹⁹ and, it would seem, for failure to attend;⁴⁰⁰ but the right so to do is not exclusive but concurrent with the right of the court to punish.⁴⁰¹

— **Costs.** The referee has no power to award costs, especially when the question of costs and all other questions, are by the order of reference reserved until the coming in of the referee's report.⁴⁰²

³⁹³ *Stubbs v. Ripley*, 39 Hun, 620.

³⁹⁴ *Ward v. Ward*, 29 Abb. N. C. 256, 21 N. Y. Supp. 795.

³⁹⁵ Rule 30 of the General Rules of Practice.

³⁹⁶ *Matter of Cleflin*, 20 State Rep. 465, 3 N. Y. Supp. 621; *Matter of Harris' Estate*, 51 Hun, 636, 3 N. Y. Supp. 621.

³⁹⁷ That it is. *Rusk v. Marston*, 1 Wkly. Dig. 566. That it is not. *Bowne v. Leveridge*, 8 Abb. N. C. 148, note.

³⁹⁸ *National State Bank v. Hibbard*, 45 How. Pr. 280, 287; *Roberts v. White*, 43 Super. Ct. (11 J. & S.) 455, 460.

³⁹⁹ *People ex rel. Baldwin v. Miller*, 9 Misc. 1, 59 State Rep. 702, 29 N. Y. Supp. 305. Procedure, see Code Civ. Proc. § 2272.

⁴⁰⁰ See Code Civ. Proc. § 2272.

⁴⁰¹ *Milton v. Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735; *Seeley's Case*, 6 Abb. Pr. 217, note.

⁴⁰² *Bon v. Sanford*, 23 Hun, 520. See, also, *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. Supp. 246.

§ 1885. **Hearing on reference to take an account.**

Where a case is referred pursuant to an order directing the referee "to take and state an account," he is a mere substitute for a master under the old chancery practice and he must be governed by the rules which regulate that practice.⁴⁰³ An order to take and state an account gives the referee the incidental power formerly exercised by a master in chancery, i. e., the power necessarily incidental to the proper execution of his work.⁴⁰⁴ By the 102d and 107th rules of the court of chancery, the master in chancery had the power, under a reference, to take testimony and state the accounts, to regulate the manner in which the reference was to be executed, and to require the parties within a reasonable time to exhibit in writing before him the several items of charge which they claim against the adverse party, so that it might be known to what points the examination of the witnesses should be directed.⁴⁰⁵ All the parties accounting must bring in their accounts in form of debtor and creditor.⁴⁰⁶ The party must bring his whole account and for the whole period for which he has accounted. It must also be verified by an affidavit that the account, including both debts and credits, is correct, and that the party accounting does not know of any error or omission therein to the prejudice of any of the other parties.⁴⁰⁷ The referee may not only require the exhibit in writing of the items of account, but he may also preclude the parties from making claims for any other items than those which they present, unless they furnish reasonable excuse for the neglect.⁴⁰⁸ These chancery rules need not, however, be followed unless a party so demands.⁴⁰⁹ A referee appointed

⁴⁰³ *Palmer v. Palmer*, 13 How. Pr. 363; *Milton v. Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735.

⁴⁰⁴ *Milton v. Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735.

⁴⁰⁵ *Id.*; *Story v. Brown*, 4 Paige, 112-115.

⁴⁰⁶ 2 Barb. Ch. Pr. 505.

⁴⁰⁷ 2 Barb. Ch. Pr. 506; *Story v. Brown*, 4 Paige, 112.

⁴⁰⁸ *Milton v. Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735; *Story v. Brown*, 4 Paige, 112.

⁴⁰⁹ *Hathaway v. Russell*, 45 Super. Ct. (13 J. & S.) 538, 542.

to take and state an account in an action in which no answer is interposed may take and state the account down to the time of the hearing.⁴¹⁰

The referee has the power to allow, in any form that does not work injustice, an objection to the account presented, whether or not a statement of objections has been previously made. A formal filing of objections implies that the accounting party need not prepare to meet any other objection; but the court has power to allow other objections to be made giving the accounting party opportunity to meet them.⁴¹¹ The referee may disallow items, even if no specific objections are made, where they appear fraudulent or objectionable on their face, provided he points them out to the accounting party and gives him opportunity to show them to be just.⁴¹² A referee to compute the amount due has no authority to determine any questions of law.⁴¹³

(C) REQUESTS TO FIND.

§ 1886. General considerations.

Either party to an action tried before the court without a jury, or by a referee, may submit a statement of the facts which he deems established by the evidence and of the rulings on questions of law which he desires the court or referee to make.¹ Prior to 1894 such practice was authorized by section 1023 of the Code. This procedure had been abused to such an extent that in 1894 the statute was repealed. In 1904, the repealed Code provision was re-enacted with an additional clause authorizing an exception to a refusal to find. The decisions rendered under the Code section prior to its repeal in 1894 are applicable except in so far as will be noticed hereafter.

Whether requests to find shall be submitted rests with the party. It may be advisable in order to clearly present to the

⁴¹⁰ *Darling v. Brewster*, 55 N. Y. 667.

⁴¹¹ *Hyatt v. Mark*, 55 Super. Ct. (23 J. & S.) 507, 2 N. Y. Supp. 727.

⁴¹² *Heywood v. Kingman*, 29 Abb. N. C. 75, 19 N. Y. Supp. 321, 882.

⁴¹³ *Mackay v. Bennington*, 82 Hun, 509, 31 N. Y. Supp. 716.

¹ Code Civ. Proc. § 1023.

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judge or referee the contentions of the party as to the material facts deemed to have been established and the rules of law which should be held applicable thereto. In so far as increasing the scope of review on an appeal to the appellate division is concerned, the presentation of requests to find is valueless. It was held, under the Code provision prior to its repeal in 1894, that a party who failed to present a request for any finding he desired could not, on appeal, claim that the fact was established in order to overthrow the judgment;² but inasmuch as section 993 of the Code, as it now exists, specifically provides that, on appeal, the appellate division shall review all questions of fact and of law and grant to either party the judgment which the facts warrant, it would seem that the former decisions are no longer applicable.³ It seems, however, that if an appeal is taken to the court of appeals the submission of a request to find the facts enlarges the scope of review provided the request is denied and an exception taken to the refusal to find. In such a case, if the evidence is uncontroverted, and the affirmance by the appellate division is not unanimous, a question of law is raised which the court of appeals may review. This question will be fully considered in the volume relating to appellate procedure.

Requests to find are proper on a reference to determine and report the account of an executor.⁴

§ 1887. Time for submission.

The requests must be submitted to the court or referee before the cause is finally submitted or within such time afterwards, and before the decision or report is rendered, as the court or referee allows.⁵ Where the referee has signed the report and given notice to the parties, his report is rendered, so that thereafter no requests can be submitted.⁶ However, if

² *Loonam v. Myers*, 13 Daly, 535.

³ *Rumsey's Pr.* (supplement).

⁴ *Matter of Mellen*, 56 Hun, 553, 9 N. Y. Supp. 929.

⁵ Code Civ. Proc. § 1023.

⁶ *Craig v. Craig*, 66 Hun, 452, 21 N. Y. Supp. 241.

at the time of the submission the proper requests for findings are presented and the judge or referee inadvertently neglects to examine and pass upon them before making his decision, he may do so afterwards; and the rulings so made, with the exceptions thereto, properly form a part of the case.⁷ Additional findings cannot be made after a decision or report has been finally made and delivered.⁸ So requests to find cannot be first presented at the time of the settling of the case,⁹ although it has been held that if both parties request further findings at such time, they may be passed on.¹⁰ And if, upon the settlement of the case, requests for findings are presented and passed upon by the judge, and inserted in the case, with exceptions to them, it has been held that, in the absence of objection to such action and of a motion to strike them from the case, the opposing party cannot object that they were not properly before the appellate court.¹¹

§ 1888. Form and contents.

The requests to find must be in writing, and in the form of distinct propositions of law, or of fact, or both, separately stated;¹² each of which must be numbered, and so prepared, with respect to its length, and the subject and phraseology thereof, that the court or referee can conveniently pass on it.¹³ The requests should not be unnecessarily numerous, and should include only such facts as are material to the case, as they are claimed to appear upon the theory of the party presenting the

⁷ *Friedman v. Bierman*, 43 Hun, 387.

⁸ *Wainman v. Hampton*, 110 N. Y. 429; *Palmer v. Phenix Ins. Co.*, 22 Hun, 224.

⁹ *Gormerly v. McGlynn*, 84 N. Y. 284.

¹⁰ *Welch v. Preston*, 30 Hun, 303.

¹¹ *Ward v. Craig*, 87 N. Y. 550.

¹² Where statements of fact and conclusions of law are mixed, the request need not be passed on. *Sniffen v. Koechling*, 45 Super. Ct. (13 J. & S.) 61.

¹³ Code Civ. Proc. § 1023; *Sniffen v. Koechling*, 45 Super. Ct. (13 J. & S.) 61.

requests.¹⁴ The requests should be in the form of facts established, and not in the form of evidence tending to establish the facts. The propositions authorized to be presented in the requests are those which the attorney deems to be established by the evidence; and it is intended that he may present his propositions so in detail as clearly to lead to the decision which he asks to have made.¹⁵ The request to find either facts or law should be plainly stated in a single proposition the whole of which can be granted or refused.¹⁶ One who proposes an unreasonable number of findings cannot object that the court failed to discern the materiality of some of them.¹⁷ Purely negative facts should not be submitted.¹⁸

§ 1889. Disposition of requests.

The court or referee is required to pass on each request submitted to him,¹⁹ provided the facts included therein are material,²⁰ and are not purely negative in their character.²¹ But an unwarranted number of requests need not be passed on,²² and where a request presents more than one proposition the court or referee is not bound to analyze it and pass on the several parts separately.²³ A fortiori, if all of such propositions are not correct, a refusal to find the request does not constitute error.²⁴ If an attorney presents a mass of requests concerning immaterial matters, among which there is one possessing

¹⁴ Quincey v. Young, 5 Daly, 44; Bates v. Bates, 7 Misc. 547, 27 N. Y. Supp. 872.

¹⁵ Glacius v. Black, 50 N. Y. 145.

¹⁶ Schnugg v. New York El. R. Co., 6 Misc. 325, 26 N. Y. Supp. 798.

¹⁷ Quincey v. Young, 53 N. Y. 504.

¹⁸ McAndrew v. Whitlock, 32 Super. Ct. (2 Sweeny) 623.

¹⁹ Goetting v. Biehler, 33 Hun, 500; Matter of Mellen, 56 Hun, 553, 9 N. Y. Supp. 929.

²⁰ Bates v. Bates, 7 Misc. 547, 27 N. Y. Supp. 872; Schnugg v. New York El. R. Co., 6 Misc. 325, 26 N. Y. Supp. 798; Quincey v. Young, 5 Daly, 44; McAndrew v. Whitlock, 32 Super. Ct. (2 Sweeny) 623.

²¹ McAndrew v. Whitlock, 32 Super. Ct. (2 Sweeny) 623.

²² Teschmacher v. Lenz, 82 Hun, 594, 597, 31 N. Y. Supp. 543.

²³ Davis v. Howard, 73 Hun, 347, 26 N. Y. Supp. 194.

²⁴ Davis v. Leopold, 87 N. Y. 620; Koehler v. Hughes, 148 N. Y. 507.

materiality, its concealment will be deemed a sufficient excuse for its want of recognition by the court or referee, and it is not error to refuse to find it.²⁵ Requests covered by the findings embodied in the decision or report may be denied.²⁶ Refusal to find a fact is not tantamount to a finding against such fact, unless the intention of the court or referee to be so understood is clearly apparent.²⁷

At or before the time when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file, or return to the attorney, the statement thus noted; but an omission so to do does not affect the validity of the decision or report.²⁸ Any act of the court or referee is a sufficient refusal which shows that it, or he, declines to adopt the request submitted.²⁹ The requests may be refused in a single sentence, instead of marking a refusal against the margin of each singly.³⁰ So an indorsement on proposed findings that "each of the within requests is to be marked refused except so far as covered by the findings of facts and conclusions of law settled and signed by me" is sufficient.³¹ "Not found" indicates that the request was passed on.³² The signing of the requests, at the foot thereof, is sufficient.³³

²⁵ Quincey v. Young, 5 Daly, 44.

²⁶ Hunter v. Manhattan R. Co., 29 Abb. N. C. 15, 22 Civ. Proc. R. (Browne) 309, 19 N. Y. Supp. 703.

²⁷ Galle v. Tode, 148 N. Y. 270; Lawrenceville Cement Co. v. Parker, 39 State Rep. 864, 15 N. Y. Supp. 577.

²⁸ Code Civ. Proc. § 1023.

²⁹ Davis v. Leopold, 87 N. Y. 620.

³⁰ Lawrenceville Cement Co. v. Parker, 21 Civ. Proc. R. (Browne) 263, 15 N. Y. Supp. 577.

³¹ Hunter v. Manhattan R. Co., 29 Abb. N. C. 15, 22 Civ. Proc. R. (Browne) 309, 19 N. Y. Supp. 703; Queen v. Bell, 2 Misc. 575, 22 N. Y. Supp. 398.

³² Terwilliger v. Ontario, C. & S. R. Co., 73 Hun, 335, 26 N. Y. Supp. 268.

³³ Dennis v. Walsh, 41 State Rep. 103, 16 N. Y. Supp. 257.

§ 1890. Review of refusal to find.

An exception may be taken to the refusal of the court or referee to find any request properly submitted.³⁴ An appeal does not, however, lie from a refusal to find,³⁵ but the refusal is to be reviewed on an appeal from the judgment.

§ 1891. Request to find as constituting an estoppel.

A request for a finding of the damages down to the time of the trial precludes the right to object that damages were allowed for acts committed after the suit was brought.³⁶

ART. VI. REPORT.**§ 1892. Use of word in Code.**

The word "report," when used in the Code in connection with a trial or other inquiry, or a judgment, means a referee's report.⁴¹⁴

§ 1893. Definition.

The document exhibiting the referee's findings and conclusions is called his report, the purpose of which is to show the proceedings which have been had under the order of reference, the evidence which has been taken, and the findings and conclusions reached by the referee in such a manner that intelligent action may be had thereon.⁴¹⁵

§ 1894. Preparation.

After the close of the evidence and the making of arguments on both sides, the cause is usually submitted to the referee, who ordinarily files his report within sixty days or else delivers it to the successful attorney within such time.

³⁴ Code Civ. Proc. § 1023.

³⁵ *Gilmore v. Ham*, 21 Civ. Proc. R. (Browne) 102, 15 N. Y. Supp. 391.

³⁶ *Suarez v. Manhattan R. Co.*, 39 State Rep. 549, 15 N. Y. Supp. 222.

⁴¹⁴ Code Civ. Proc. § 3343, subd. 5.

⁴¹⁵ 17 Enc. Pl. & Pr. 1033.

The old chancery practice was to settle the report on the hearing of objections but such practice is now practically obsolete.⁴¹⁶ The court will in no way interfere to express an opinion how the referee shall frame his report although it may be a case of considerable difficulty and the referee be anxious to obtain such opinion.⁴¹⁷ The death of an attorney after the submission of a case to a referee does not preclude a delivery of the report, since such act is not a "further proceeding" in the action within the Code provision prohibiting such a proceeding until thirty days after notice.⁴¹⁸

If there are several referees, it suffices that a majority sign the report;⁴¹⁹ but if a majority of the referees meet and make their report without notifying the other such report will be set aside,⁴²⁰ as should a report procured by the successful party to be signed by the referees separately without their having come to any agreement while together,⁴²¹ but the mere fact that one of the referees dissents and will not sign a report does not invalidate a report signed by the remainder.⁴²²

—**Requests to find.** Prior to 1894, the Code (section 1023) authorized the attorney of either party to an action, before the case was finally submitted for decision or within such time afterwards and before the decision as the referee might allow, to submit a written statement of the facts which he deemed established by the evidence, and of rulings on questions of law which he desired the court or the referee to make, and provided that, at or before the time when the report is rendered, the referee must note in the margin of the statement, the manner in which each proposition has been disposed of, and must either file or return to the attorney the statement thus noted. This section was repealed in 1894,

⁴¹⁶ Van Sant, Eq. Pr. 563.

⁴¹⁷ 2 Barb. Ch. Prac. 54.

⁴¹⁸ Agricultural Ins. Co. v. Darrow, 70 App. Div. 413, 75 N. Y. Supp. 128.

⁴¹⁹ Code Civ. Proc. § 1026.

⁴²⁰ Brower v. Kingsley, 1 Johns. Cas. 334.

⁴²¹ Townsend v. Glens Falls Ins. Co., 10 Abb. Pr. (N. S.) 277.

⁴²² Clark v. Fraser, 1 How. Pr. 98.

but was re-enacted in 1904, with the addition of a provision permitting an exception to a refusal to find.^{422a}

§ 1895. Formal parts.

The formal parts of a report consist of the caption, the address, the date, and the signature.

— **Caption.** The report is entitled in the cause in which the reference was ordered.

— **Address.** The report is addressed to the court which ordered the reference.

— **Date.** The report should be dated as of the time when it is delivered or filed.

— **Signature.** If the reference is to one referee, he must sign the report. Where the reference is to more than one referee, a majority may sign.⁴²³

§ 1896. Contents where reference is of all the issues.

The report must dispose of all the questions arising on the issues,⁴²⁴ and must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment-roll. In an action where the costs are in the discretion of the court, the report must award or deny costs, and if it awards costs, it must designate the party to whom costs to be taxed are awarded.⁴²⁵ For instance, a report that the objections of defendant to the admissibility of all the evidence reserved for decision should be overruled and said evidence be allowed to stand and that the complaint should be dismissed is

^{422a} See ante, §§ 1886 et seq.

⁴²³ Code Civ. Proc. § 1026.

⁴²⁴ *Erhard v. County of Kings*, 69 State Rep. 624, 36 N. Y. Supp. 656; *Van Steenburgh v. Hoffman*, 6 How. Pr. 492. But if the findings fairly meet the issue and question of fact tendered, it is not necessary to pass upon every circumstance attending thereon unless it is material to the issue. The referee must pass on a counterclaim interposed. *Pinsker v. Pinsker*, 44 App. Div. 501, 60 N. Y. Supp. 902; *Cable Flax Mills v. Early*, 72 App. Div. 213, 76 N. Y. Supp. 191.

⁴²⁵ Code Civ. Proc. § 1022, as amended by Laws 1903, c. 85.

insufficient because not stating "the facts found and the conclusions of law."⁴²⁶ A general finding of a referee, like a general verdict, is controlled by a special one.⁴²⁷ If findings are inconsistent, the appellant is entitled to those most favorable to him.⁴²⁸ A further finding not involved in the issues and which supports equitable relief is not prejudicial where the recovery is based on a proper finding.⁴²⁹ In an action for an accounting, where all the issues are referred, the referee may direct an interlocutory judgment and a subsequent accounting instead of proceeding with the trial and accounting to a point where he can direct a final judgment,⁴³⁰ or he may, if he finds defendant liable to account, proceed with the accounting.⁴³¹

Where double, treble, or other increased damages are given by statute, the report of the referee must specify the sum awarded as single damages, and direct judgment for the increased damages.⁴³²

— **Findings of facts.** The facts which form the basis of the judgment must be found, i. e., the facts essential to the judgment or to sustain the conclusions of law. Other facts need not be negatived in express terms since facts not found are negatived by implication.⁴³³ The report must contain a

⁴²⁶ *Rowlands v. Young Men's Christian Ass'n*, 32 Misc. 421, 66 N. Y. Supp. 577.

⁴²⁷ *Bennett v. Buchan*, 76 N. Y. 386.

⁴²⁸ *Morris v. Wells*, 26 State Rep. 9, 7 N. Y. Supp. 61.

⁴²⁹ *Barbeau v. Picotte*, 35 State Rep. 785, 13 N. Y. Supp. 132.

⁴³⁰ *Bennet v. Bennet*, 10 App. Div. 550, 554, 42 N. Y. Supp. 435; *Palmer v. Palmer*, 13 How. Pr. 363; *Niebuhr v. Schreyer*, 15 Daly, 35, 22 Abb. N. C. 12, 18 State Rep. 814, 2 N. Y. Supp. 413; *Hathaway v. Russell*, 45 Super. Ct. (13 J. & S.) 538, 7 Abb. N. C. 138, 46 Super. Ct. (14 J. & S.) 103; *Manning v. Manning*, 87 Hun, 221, 67 State Rep. 766, 33 N. Y. Supp. 1029. In *Garczynski v. Russell*, 75 Hun, 492, 57 State Rep. 666, 27 N. Y. Supp. 458, it is held that the referee must proceed and take the account.

⁴³¹ *Crosbie v. Leary*, 19 Super. Ct. (6 Bosw.) 312. In such case, an interlocutory judgment that an accounting is necessary need not be entered. *Young v. Valentine*, 177 N. Y. 347, 354.

⁴³² Code Civ. Proc. § 1020.

⁴³³ *Nelson v. Ingersoll*, 27 How. Pr. 1; *Sermont v. Baetjer*, 49 Barb.

positive finding of the facts;⁴³⁴ but need not include issues on which no evidence is offered,⁴³⁵ nor facts not vital or controlling,⁴³⁶ nor find as an additional fact an inference which may be drawn from facts already found,⁴³⁷ nor specify the evidence from which the referee draws conclusions of fact.⁴³⁸ It is proper to find on a question within the issues though not distinctly raised by the pleadings.⁴³⁹ The report need not incorporate, nor make special findings as to, documentary evidence which has been introduced in evidence.⁴⁴⁰ A finding of fact is not deprived of its force because placed among the conclusions of law,⁴⁴¹ though the findings of fact are required to be separate from the conclusions of law. A finding will be held to embrace whatever finding of fact is essential to it, and is sufficient where clearly supported by the evidence and where it is the necessary result of the specific facts already found.⁴⁴² A fact essential to sustain the decision established by uncontradicted evidence is presumed to have been found by the referee, although not stated in his report.⁴⁴³ Where the

362; *Lefler v. Field*, 50 Barb. 407; *McAndrew v. Whitlock*, 32 Super. Ct. (2 Sweeny) 623. Findings negating the existence of facts claimed to exist are no findings at all, and exceptions thereto are unavailing. *Raabe v. Squier*, 5 Misc. 220, 54 State Rep. 824, 25 N. Y. Supp. 463.

⁴³⁴ *Alcock v. Davitt*, 179 N. Y. 9; *Bradley v. McLaughlin*, 8 Hun, 545.

⁴³⁵ *Ingraham v. Gilbert*, 20 Barb. 151.

⁴³⁶ *Steubing v. New York El. R. Co.*, 138 N. Y. 658.

⁴³⁷ *Benjamin v. New York El. R. Co.*, 44 State Rep. 538, 17 N. Y. Supp. 908.

⁴³⁸ *Avery v. Foley*, 4 Hun, 415; *Wilson v. Knapp*, 42 Super. Ct. (10 J. & S.) 25; *Dolan v. Merritt*, 18 Hun, 27.

⁴³⁹ *Van Buskirk v. Stow*, 42 Barb. 9.

⁴⁴⁰ *McCullough v. Dobson*, 133 N. Y. 114.

⁴⁴¹ *Matter of Clark*, 119 N. Y. 427; *Sherman v. Hudson River R. Co.*, 64 N. Y. 254; *Jarvis v. Jarvis*, 66 Barb. 331. But in *Alcock v. Davitt*, 179 N. Y. 9, it was held that a finding of law could not be treated as a finding of fact where the nature of the finding is not reasonably clear and apparent.

⁴⁴² *Gibson v. Stetzer*, 3 Hun, 539.

⁴⁴³ *Bancker v. City of New York*, 8 Hun, 409.

evidence is undisputed a finding of a referee expressed as a finding of fact is in effect a conclusion of law.^{443a}

— **Conclusions of law.** The conclusions of law should be stated separately. A general finding in favor of plaintiff will be construed to include a finding in his favor of every question necessary to the support of his case.⁴⁴⁴ If a referee states in detail the facts constituting a transaction, his finding as to the effect of such facts may be regarded as a conclusion of law.⁴⁴⁵

The report must direct the judgment to be entered on the report.⁴⁴⁶ The requirement is satisfied, however, if from the whole or a part of the report the form and terms of the proper judgment can be ascertained.⁴⁴⁷ A statement that plaintiff is entitled to judgment of foreclosure and sale, and for a deficiency, if any, is sufficient,⁴⁴⁸ as is a conclusion of law "that defendant should be ordered and adjudged to account."⁴⁴⁹ So where the conclusion of law in a referee's report specified the sum for which each of several parties was entitled to judgment, the report is sufficient.⁴⁵⁰ But where an action is brought against an executrix and the conclusion of law is merely that plaintiff is entitled to judgment against defendant, the report is insufficient for failure to direct judgment against defendant either as an individual or in her representative capacity.⁴⁵¹

Moving for judgment on the report of the referee waives

^{443a} *Mt. Sinai Hospital v. Hyman*, 92 App. Div. 270, 87 N. Y. Supp. 276. See, also, ante, note 441.

⁴⁴⁴ *Nelson v. Ingersoll*, 27 How. Pr. 1; *Cooper v. Bean*, 5 Lans. 318.

⁴⁴⁵ *Hotchkiss v. Mosher*, 48 N. Y. 478.

⁴⁴⁶ Code Civ. Proc. § 1022.

⁴⁴⁷ *Hinds v. Kellogg*, 37 State Rep. 356, 13 N. Y. Supp. 922; *Gold v. Serrell*, 2 Misc. 224, 21 N. Y. Supp. 1078.

⁴⁴⁸ *Albany County Sav. Bank v. McCarty*, 71 Hun, 227, 54 State Rep. 577, 24 N. Y. Supp. 991.

⁴⁴⁹ *Hathaway v. Russell*, 46 Super. Ct. (14 J. & S.) 103.

⁴⁵⁰ *Devlin v. City of New York*, 37 State Rep. 508, 13 N. Y. Supp. 924.

⁴⁵¹ *Clason v. Baldwin*, 36 State Rep. 982, 13 N. Y. Supp. 371.

the right to insist that the report be set aside on the ground that it does not direct the judgment to be entered.⁴⁵²

— Form of report.

[Title of cause.]

To the ——— court:

I, the undersigned, sole referee [or if there is more than one referee, “we, the undersigned, referees”] duly appointed by an order of this court, bearing date the ——— day of ———, 190—, to hear and determine the whole issues in the above-entitled action, do hereby report as follows:

I. I [or we] have taken and subscribed the statutory oath which is hereto annexed [or if the oath was waived by the parties, so state and add “as appears by the stipulation hereto annexed”].

II. I [or we] have been attended by the parties to the above action and ———, who appeared as attorney in behalf of ———, and ———, who appeared as attorney in behalf of ———, and now having heard the proofs of the parties and the arguments of counsel thereon, I [or we] find and report as follows:

III. I [or we] find as matters of fact [here state in separate paragraphs the findings of fact].

IV. I [or we] find as conclusions of law [here state in separate paragraphs the conclusions of law and conclude with the statement as to judgment to be recovered by adding “and I order judgment therefor with costs to be taxed,” etc.].

[Date.]

A. X.,
Referee.

§ 1897. Contents where reference is of part of issues.

If the reference is to hear and determine a part of the issues, the report should be confined to such issues and should not fix the judgment to be entered except where the other issues have been tried.⁴⁵³ The report need not refer to the judgment already given by the court on the issue of law.⁴⁵⁴

⁴⁵² Devlin v. City of New York, 128 N. Y. 615.

⁴⁵³ See post, § 1899.

⁴⁵⁴ Breckenridge Co. v. Perkins, 14 App. Div. 629, 43 N. Y. Supp. 800.

§ 1898. Contents on hearing of demurrer or motion for nonsuit.

The report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make any finding of fact. Where it directs an interlocutory judgment, with leave to the party in fault to plead anew or amend, or permitting the action to be divided into two or more actions, and no other issue remains to be disposed of, it may also direct the final judgment to be entered if the party in fault fails to comply with any of the directions given or terms imposed.⁴⁵⁵ Prior to 1895 this Code section did not apply to nonsuits and it was held insufficient to simply state conclusions of law in the report,⁴⁵⁶ but such a report is now sufficient since no findings of fact are necessary.⁴⁵⁷ But if the referee grants a nonsuit at the close of plaintiff's case, his report should not dismiss the complaint on the merits;⁴⁵⁸ though if, after defendant moves for a nonsuit or dismissal at the close of plaintiff's case, no ruling is announced, and evidence is produced on defendant's side, the ultimate findings of the referee on the entire case will be deemed a decision on the merits even though the judgment ordered be "that the complaint be dismissed."⁴⁵⁹

— Form of report on motion for nonsuit.

[Title of cause.]

To the ——— court:

I, the undersigned referee, duly appointed by order of this court,

⁴⁵⁵ Code Civ. Proc. § 1021.⁴⁵⁶ Baker v. Moore, 88 Hun, 458, 34 N. Y. Supp. 874.⁴⁵⁷ See, also, Place v. Hayward, 117 N. Y. 487, and Lugar v. Byrnes, 29 Abb. N. C. 280, 21 N. Y. Supp. 753, which were decided before the amendment of 1895.⁴⁵⁸ Place v. Hayward, 117 N. Y. 487.⁴⁵⁹ Van Derlip v. Keyser, 68 N. Y. 443.

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bearing date the —— day of ——, 190—, to [state object of reference], do hereby report:

I. That I have taken the statutory oath which is filed herewith.

II. That I have summoned the several parties to appear and attend before me, as appears by said summons hereto annexed.

III. That I have been attended on said reference by ——.

IV. That I have heard the proofs and allegations and taken the testimony of the parties and witnesses which is hereto annexed.

V. That the defendant, without resting his case or commencing the giving of evidence on his side, moved to dismiss the complaint on the ground that the undisputed evidence given by the plaintiff was insufficient to sustain the cause of action alleged in the complaint.

VI. I find as a conclusion of law the following:

1. That there is no evidence that ——.

VII. I find that the defendant is entitled to judgment against plaintiff dismissing the complaint but not on the merits, and I do order judgment to be entered accordingly.

[Date.]

A. X.,
Referee.

—— Form of report on hearing on demurrer.

[Title of cause.]

To the —— court:

I, the undersigned, sole referee duly appointed by order of this court, bearing date the —— day of ——, 190—, to hear and determine a demurrer interposed to the —— in this case, do hereby report as follows:

I. I have taken and subscribed the statutory oath, etc.

II. I have been attended by the parties and by ——, who appeared as attorney in behalf of ——, and ——, who appeared as attorney in behalf of ——, and have heard their arguments, and I do find as follows:

III. I find as matter of law that —— is entitled to judgment on the demurrer herein with costs, and I direct an interlocutory judgment sustaining such demurrer to be entered herein with leave to —— to amend his pleading on condition that ——, and in case said —— fails to comply with the terms hereby imposed within —— days from notice of the entry of said interlocutory judgment that final judgment be entered for —— with costs.

[Date.]

A. X.,
Referee.

§ 1899. Contents where reference is interlocutory.

The kinds of interlocutory references are so numerous that

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it will be impossible in this connection to consider the contents of the report in each case. A few general rules may, however, be laid down. In the first place, the scope of the report is to be determined by the terms of the order of reference. If a question of fact arising on a motion is submitted to a referee, his report should be limited to a decision of such question and not decide the motion.⁴⁶⁰ A finding of fact on a question not referred but supposed to be disclosed by proofs has no force as a finding of fact so as to support an order based thereon.⁴⁶¹ The testimony is attached to the report and it is the better practice to find the facts separately and then, if the referee is directed to report his opinion, to separately state the referee's opinion on the facts. Where the reference is to examine and report as to particular facts or as to any other matter, it is the duty of the referee to draw the conclusions from the evidence before him and to report such conclusions only, and it is irregular and improper to set forth the evidence in his report without special direction of the court. On a reference to state an account, a general finding is not sufficient but the items allowed should be stated.⁴⁶² A referee to take an accounting may properly omit findings concerning a claim not connected with the accounting and not pleaded.⁴⁶³ On a reference to compute the amount of damages on an undertaking, it is not necessary, though it may sometimes be desirable, that the referee should report his findings of fact or conclusions of law; but the practice is satisfied if he report his conclusion as to the damages sustained, with the items of allowance that have been made by him, together with the evidence he has taken.⁴⁶⁴ The fact that the referee not only returns the testimony taken before him but also his opinion in regard thereto which is not called for by the order appointing him is not fatal even though the court

⁴⁶⁰ *Woodward v. Musgrave*, 14 App. Div. 291, 77 State Rep. 830, 4 Ann. Cas. 136, 43 N. Y. Supp. 830.

⁴⁶¹ *Savage v. Sherman*, 87 N. Y. 277.

⁴⁶² *Spooner v. Lefevre*, 2 T. & C. 666.

⁴⁶³ *Turner v. Weston*, 133 N. Y. 650.

⁴⁶⁴ *Matthews v. Murchison*, 14 Abb. N. C. 512, note.

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at special term seems to have been influenced by such opinion.⁴⁶⁵

— General form of report on interlocutory reference.

[Title of cause.]

To the ——— court:

I, the undersigned, sole referee, duly appointed by order of this court, bearing date the ——— day of ———, 190—, to ——— [briefly state order] do hereby report as follows:

I. I have taken the statutory oath, etc.

II. I have summoned the parties to appear and attend before me on this reference as appears by the summons hereto annexed.

III. I have been attended by ———.

IV. I have heard the testimony of the parties and the witnesses produced before me which said testimony is hereunto annexed.

V. I find the following to be the facts:

VI. I am therefore of the opinion that ———.

[Date.]

A. X.,

Referee.

— Form of report of referee to take and state an account.

[Caption as in preceding form.]

To the ——— court:

I, the undersigned, referee [same as in preceding form].

I. [Same as in preceding form.]

II. [Same as in preceding form.]

III. [Same as in preceding form.]

IV. [Same as in preceding form.]

V. I have adjusted a mutual account between the parties hereto, making all just allowances, and showing what, on striking a balance, appears to be due from each party to the other, which said account is hereto annexed.

VI. I find that ——— is indebted to ——— in the sum of ——— dollars with interest from ———.

[Date.]

A. X.,

Referee.

§ 1900. Amendment.

The referee has no power to alter or amend his report after it is signed and the parties are notified, though the report is

⁴⁶⁵ Matter of Chittenden, 4 State Rep. 606.

not filed nor delivered.⁴⁶⁶ The referee cannot, of his own motion, make new findings after he has reported.⁴⁶⁷

§ 1901. Time in which to make report.

The referee's written report must be either filed with the clerk or delivered to the attorney for one of the parties within sixty days from the time when the cause or matter is finally submitted, otherwise either party may, before it is filed or delivered, serve a notice upon the attorney for the adverse party, that he elects to end the reference. In such a case, the action must thenceforth proceed as if the reference had not been directed, and the referee is not entitled to any fees.⁴⁶⁸ This applies not only to references to hear and determine issues but also to references of incidental matters under section 1015 of the Code,⁴⁶⁹ though it does not apply to a reference in a special proceeding.⁴⁷⁰ It should be noticed that a report made more than sixty days after the cause is finally submitted is not void "unless notice has been given."⁴⁷¹ Hence, a notice to terminate is ineffectual if the report is actually delivered before service of the notice.⁴⁷² Observe further that the report must be either "filed with the clerk or delivered to the attorney for one of the parties" within sixty days; it is not

⁴⁶⁶ *Craig v. Craig*, 66 Hun, 452, 50 State Rep. 461, 21 N. Y. Supp. 241; *Quackenbush v. Johnson*, 55 How. Pr. 96. A fortiori, the report cannot be amended by the referee after its delivery. *Shearman v. Justice*, 22 How. Pr. 241.

⁴⁶⁷ *Nelson v. Ingersoll*, 27 How. Pr. 1; *Voorhis v. Voorhis*, 50 Barb. 119; *In re Richardson's Estate*, 2 Misc. 288, 23 N. Y. Supp. 978.

⁴⁶⁸, ⁴⁶⁹ Code Civ. Proc. § 1019.

⁴⁷⁰ Application to compel attorney to pay over moneys. *Matter of Bennett*, 21 Abb. N. C. 238, 48 Hun, 612, 1 N. Y. Supp. 27. Application for change of attorneys. *Doyle v. City of New York*, 26 Misc. 61, 56 N. Y. Supp. 441. Disputed claim against estate of decedent. *Godding v. Porter*, 17 Abb. Pr. 374.

⁴⁷¹ *Livingston v. Gidney*, 25 How. Pr. 1; *Foster v. Bryan*, 16 Abb. Pr. 396, 26 How. Pr. 164; *Mantles v. Myle*, 26 How. Pr. 409; *Lampman v. Smith*, 17 Civ. Proc. R. 19, 7 N. Y. Supp. 922.

⁴⁷² *O'Neill v. Howe*, 16 Daly, 181, 31 State Rep. 272, 9 N. Y. Supp. 746.

Art. VI. Report.—Time in Which to Make Report.

sufficient that the referee has his report ready for delivery and has notified the attorney.⁴⁷³ If it is claimed the report was delivered, the delivery must have been unqualified; it not being sufficient to deliver the report on condition that it would not be filed until the fees of the referee were paid.⁴⁷⁴ But if a report has actually been filed, though it is insufficient, a notice to terminate is ineffectual.⁴⁷⁵

The right given to terminate a reference because of failure to file a report is an absolute one,⁴⁷⁶ and a party cannot be deprived of it against his will.⁴⁷⁷ It follows that the court has no power to order a party to take up and file a referee's report before the expiration of sixty days and thus deprive him of his right to terminate the reference without being liable for costs in the event that the referee does not file the report within sixty days.⁴⁷⁸

The right may be exercised as well by executors and administrators as by persons acting in an individual capacity.⁴⁷⁹

— **Waiver of right to terminate.** This provision as to filing a report within sixty days is enacted for the benefit of parties to the litigation and may be waived by them, not only by formal stipulation, but by such conduct as in fairness estops the litigant from taking advantage of the strict letter of the law;⁴⁸⁰ and such waiver may be for an indefinite time⁴⁸¹

⁴⁷³ Phipps v. Carman, 84 N. Y. 650; Little v. Lynch, 99 N. Y. 112; Bishop v. Bishop, 30 Abb. N. C. 296, 24 N. Y. Supp. 888.

⁴⁷⁴ Douglas v. Smith, 47 State Rep. 54, 65 Hun, 11, 19 N. Y. Supp. 630.

⁴⁷⁵ Tallmadge v. Lounsbury, 36 State Rep. 684, 59 Super. Ct. (27 J. & S.) 131, 13 N. Y. Supp. 602; Parker v. Baxter, 19 Hun, 410, 418.

⁴⁷⁶ Gregory v. Cryder, 10 Abb. Pr. (N. S.) 289.

⁴⁷⁷ Little v. Lynch, 99 N. Y. 112; Morrow v. McMahon, 71 App. Div. 171, 75 N. Y. Supp. 534.

⁴⁷⁸, ⁴⁷⁹ Morrow v. McMahon, 71 App. Div. 171, 75 N. Y. Supp. 534.

⁴⁸⁰ Dwyer v. Hoffman, 39 Hun, 360.

⁴⁸¹ Ballou v. Parsons, 55 N. Y. 673. In Gill v. Clark, 31 Misc. 337, 65 N. Y. Supp. 406, the attorneys for both parties joined in a note to the referee, asking him to procure a decision "in the near future," and it was held proper for the attorney for plaintiff to serve notice ending the reference, where no report had been made a month later.

or for a fixed period.⁴⁸² Granting an extension of time does not, however, waive the right to give notice after the expiration of the extended time;⁴⁸³ but if the time has been extended indefinitely, the reference cannot be terminated except by serving notice on the referee and on the opposing party that unless the report is made within a specified reasonable time the reference will be deemed terminated.⁴⁸⁴ A stipulation to allow the referee all the time he requires to make his report is valid although not in writing,⁴⁸⁵ where a memorandum is entered in the minutes.⁴⁸⁶

— **When time begins to run.** The sixty days do not commence to run until the cause is submitted.⁴⁸⁷ There is no submission until the time to hand in briefs has passed, and the referee has an inherent power in his discretion to enlarge the time for the submission of briefs.⁴⁸⁸ The sixty days also runs from the second submission to the referees after the death of one referee pending a decision.⁴⁸⁹ But where, after a referee has made his report, the parties consent to an order to return the report to make a supplemental finding, and the matter is not thereafter finally submitted to the referee so as to set the sixty days running within which he must make his report, a notice to terminate is ineffectual.⁴⁹⁰

⁴⁸² *Patterson v. Knapp*, 83 Hun, 492, 32 N. Y. Supp. 32.

⁴⁸³ *National Bank of Newburgh v. Smith*, 5 Hun, 183; *Patterson v. Knapp*, 83 Hun, 492, 65 State Rep. 188, 24 Civ. Proc. R. 251, 32 N. Y. Supp. 32.

⁴⁸⁴ *Ballou v. Parsons*, 55 N. Y. 673. To same effect, *Thiesselin v. Rossett*, 3 Abb. Pr. (N. S.) 54.

⁴⁸⁵ *Sproull v. Star Co.*, 45 App. 575, 61 N. Y. Supp. 404.

⁴⁸⁶ *Patterson v. Knapp*, 83 Hun, 492, 65 State Rep. 188, 24 Civ. Proc. R. 251, 32 N. Y. Supp. 32.

⁴⁸⁷ *Morrison v. Lawrence*, 2 How. Pr. (N. S.) 72.

⁴⁸⁸ *Morrison v. Lawrence*, 2 How. Pr. (N. S.) 72. Omission to leave exhibits with referee does not, however, prevent the running of the sixty days. *Gregory v. Cryder*, 10 Abb. Pr. (N. S.) 289. Receipt of briefs does not, however, necessarily extend time of final submission. *Matter of Santos' Estate*, 31 Misc. 76, 64 N. Y. Supp. 572.

⁴⁸⁹ *Berls v. Metropolitan El. Ry. Co.*, 37 State Rep. 608, 15 N. Y. Supp. 155.

⁴⁹⁰ *Merritt v. Merritt*, 18 App. Div. 313, 45 N. Y. Supp. 833.

Art. VI. Report.—Time in Which to Make Report.

— **Who may give notice to terminate.** The notice must be signed by the attorney and not by the party himself.⁴⁹¹

— **Service of notice.** The notice is to be served on the attorney for the adverse party.⁴⁹²

— **Sufficiency of notice.** Any notice distinctly giving the opposite party information that the party serving the notice has elected to end the reference for the delay in making the report is sufficient.⁴⁹³

— **Effect of notice.** After the giving of notice, all subsequent proceedings by or before the referee are void,⁴⁹⁴ and a judgment entered on such a report will be set aside.⁴⁹⁵ The action must thenceforth proceed as if the reference had not been directed, and the referee is not entitled to any fees.⁴⁹⁶

— **Waiver of notice.** The notice of election to terminate the reference is not waived by filing objections to the report.⁴⁹⁷

— **Enlarging time.** It would seem that the court has power to render the report valid by an order enlarging the time for delivering the report, or otherwise, after the sixty days have expired,⁴⁹⁸ though there is authority to the contrary.⁴⁹⁹

§ 1902. Vacation or setting aside.

Alleged errors in the rulings of the referee on the hearing, or the question of the sufficiency of the evidence to support the findings, cannot be reviewed on a motion to set aside the report, since the remedy in such a case is by a motion for a

⁴⁹¹ *Halsey v. Carter*, 29 Super. Ct. (6 Rob.) 535.

⁴⁹² That adverse attorney on whom notice is served was not formally substituted as such is immaterial. *Bishop v. Bishop*, 30 Abb. N. C. 296, 24 N. Y. Supp. 888.

⁴⁹³ *Gregory v. Cryder*, 10 Abb. Pr. (N. S.) 289. Notice of trial on sixty-first or any subsequent day as sufficient. *Livingston v. Gidney*, 25 How. Pr. 1.

⁴⁹⁴ *Gregory v. Cryder*, 10 Abb. Pr. (N. S.) 289.

⁴⁹⁵ *Little v. Lynch*, 5 Civ. Proc. R. (Browne) 216, 67 How. Pr. 1.

⁴⁹⁶ Code Civ. Proc. § 1019.

⁴⁹⁷ *Matter of Santos' Estate*, 31 Misc. 76, 64 N. Y. Supp. 572.

⁴⁹⁸ *Halsey v. Carter*, 29 Super. Ct. (6 Rob.) 535.

⁴⁹⁹ *Gregory v. Cryder*, 10 Abb. Pr. (N. S.) 289.

new trial or an appeal.⁵⁰⁰ But a motion to set aside a report may be made after the report has been filed⁵⁰¹ because of irregularities such as the bias or misconduct of the referee, or the failure to separately state the findings of fact and the conclusions of law,⁵⁰² or matters arising subsequent to the submission which could not be brought before the court by appeal,⁵⁰³ or because the party was misled by supposing that the order of reference referred to two actions instead of only one.⁵⁰⁴ So if the report is defective and a further report cannot be had because of the death or absence of the referee or other reason, the court should set it aside on motion.⁵⁰⁵ So a judgment ordered by a referee without taking an account in a case where an account is necessary may be set aside on motion.⁵⁰⁶ But the report should not be set aside on the ground that the referee has expressed himself against actions such as the one referred;⁵⁰⁷ nor to enable newly discovered evidence to be taken;⁵⁰⁸ nor merely because the referee was in failing health and died six days after making the report

⁵⁰⁰ *Maicas v. Leony*, 113 N. Y. 619; *Albany Brass & Iron Co. v. Hoffman*, 30 App. Div. 76, 51 N. Y. Supp. 779; *Durant v. Pierson*, 19 Civ. Proc. R. 203, 12 N. Y. Supp. 145; *Goodrich v. Goodrich*, 21 Wkly. Dig. 264; *Hassler v. Turnbull*, 55 Super. Ct. (23 J. & S.) 300; *Simmons v. Johnson*, 6 How. Pr. 489; *Donohue v. Champlin*, Code R. (N. S.) 138; *Church v. Rhodes*, 6 How. Pr. 281; *Enos v. Thomas*, 5 How. Pr. 361, Code R. (N. S.) 67.

⁵⁰¹ *Ingraham v. Gilbert*, 20 Barb. 151.

⁵⁰² *Leffler v. Field*, 33 How. Pr. 385. But it is not a sufficient ground for setting aside the reference and ordering a new reference to try the case de novo, where there had already been a long trial and considerable expense incurred, and both parties had rested their case before the referee. *Maicas v. Leony*, 113 N. Y. 619. An order may be made requiring the referee to make a further report. *Snook v. Fries*, 19 Barb. 313; *Baker v. Moore*, 88 Hun, 458, 34 N. Y. Supp. 874.

⁵⁰³ *Barton v. Herman*, 8 Abb. Pr. (N. S.) 399, 3 Daly, 320.

⁵⁰⁴ *Devoe v. Nutter*, 1 Hun, 713, 4 T. & C. 651.

⁵⁰⁵ *Peck v. Yorks*, 14 How. Pr. 416.

⁵⁰⁶ *Bouton v. Bouton*, 40 How. Pr. 217.

⁵⁰⁷ *Donnelly v. Donnelly*, 63 How. Pr. 481.

⁵⁰⁸ Remedy is by motion for new trial. *Holmes v. Evans*, 59 Super. Ct. (27 J. & S.) 121, 13 N. Y. Supp. 610.

where he personally attended to his business up to two days before his death.⁵⁰⁹ So the report will not be set aside on the ground that the action is not referable, on the application of a party who swore it was referable.⁵¹⁰ The question whether there is a clerical error in the report cannot be considered on appeal since it must be corrected in the lower court.^{510a}

Disqualification or misconduct of a referee is waived, however, by proceeding with the reference after learning thereof.⁵¹¹

The motion is usually made at special term.⁵¹² It has been held that the motion should be made before the entry of judgment,⁵¹³ but it is common practice to move to set aside the report and to vacate the judgment entered thereon. The motion should be made promptly as laches may be fatal,⁵¹⁴ if not excused.⁵¹⁵ If the motion is based on extrinsic facts, affidavits should be made to support the motion. In reply, counter-affidavits are permissible. The charges must be affirmatively proved.⁵¹⁶ The order is appealable to the appellate division but the discretion of the court is not reviewable in the court of appeals.⁵¹⁷ Costs should not be imposed as a condition of setting aside the report where the error or omission complained of was committed by the referee.⁵¹⁸

⁵⁰⁹ *McCulloch v. Dobson*, 39 State Rep. 908, 15 N. Y. Supp. 602.

⁵¹⁰ *Bloore v. Potter*, 9 Wend. 480.

^{510a} *New York Bank Note Co. v. Hamilton Bank N. E. & P. Co.*, 92 App. Div. 427, 87 N. Y. Supp. 200.

⁵¹¹ *Fudickar v. Guardian Mut. Ins. Co.*, 62 N. Y. 405; *Katt v. Germania Fire Ins. Co.*, 4 Month. Law Bul. 59; *Matter of Koch's Ex'r*, 33 Misc. 153, 159, 68 N. Y. Supp. 375.

⁵¹² *Brush v. Mullany*, 12 Abb. Pr. 344. May be made at trial term. *Tracy v. Talmadge*, 1 Abb. Pr. 460.

⁵¹³ *Comstock v. Rathbone*, 1 Johns. 138; *Macpherson v. Ronner*, 40 Super. Ct. (8 J. & S.) 448.

⁵¹⁴ *Patterson v. Graves*, 11 How. Pr. 91.

⁵¹⁵ *Greenwood v. Marvin*, 29 Hun, 99; *Peterkin v. Cotheal*, 1 N. Y. Leg. Obs. 219. Lapse of four years held not fatal. *Burrows v. Dickinson*, 35 Hun, 492.

⁵¹⁶ *Gray v. Fisk*, 12 Abb. Pr. (N. S.) 213, 42 How. Pr. 135.

⁵¹⁷ *McCulloch v. Dobson*, 133 N. Y. 114.

⁵¹⁸ *O'Brien v. Long*, 49 Hun, 80, 17 State Rep. 510, 1 N. Y. Supp. 695.

— **Misconduct of referee.** Actual corruption is not necessary to found a motion to set aside a referee's report for misconduct, but the question is whether the fairness of his decision is justly questioned; and any indiscreet action on his part from which improper inferences can be drawn, such as changing his decision after a dispute as to fees, suffices.⁵¹⁹ As said in an early case, a referee should not only avoid all improper influences but also "the appearance of evil."⁵²⁰ The report may be set aside where the referee has been influenced in his decision by private conversations with the attorney of one of the parties;⁵²¹ or where the referee might have been influenced by the fact that he had suggested a settlement which had been disregarded by plaintiff, though no intentional wrong is shown;⁵²² or where the opinion was submitted to one of the attorneys before deciding the case;⁵²³ or where the referee promised both parties a favorable decision at different times;⁵²⁴ or where the report was rendered in favor of the party who agreed to the referee's request for larger fees made after submission of the cause;⁵²⁵ or where the referee agrees with the stenographer for a division of the stenographer's fees.⁵²⁶ On the other hand, the report should not be set aside "on the application of the losing party" on the ground of the conduct of the referee in negotiating for and receiving fees from him upon an agreement to report in his favor.⁵²⁷

⁵¹⁹ *Reynolds v. Moore*, 1 App. Div. 105, 72 State Rep. 225, 37 N. Y. Supp. 72. To same effect, *Harlem Bank v. Todd*, 4 Wkly. Dig. 64. In *Burrows v. Dickinson*, 35 Hun, 492, it appeared that the referee had from time to time, as the trial proceeded, importuned the defendant to aid him in securing an appointment to a political office, and that he had continued to do so after the submission of the case and until near the time of the decision.

⁵²⁰, ⁵²¹ *Dorlon v. Lewis*, 9 How. Pr. 1.

⁵²² *Livermore v. Bainbridge*, 47 How. Pr. 354.

⁵²³ *Yale v. Gwinits*, 4 How. Pr. 253.

⁵²⁴ *Roosa v. Saugerties & W. Turnpike Road Co.*, 12 How. Pr. 297.

⁵²⁵ *Dickinson v. Earle*, 63 App. Div. 134, 71 N. Y. Supp. 227; *Greenwood v. Marvin*, 29 Hun, 99. As to agreement for lien on judgment for fees, see *Leonard v. Mulry*, 5 Month. Law Bul. 24.

⁵²⁶ *Dickinson v. Earle*, 63 App. Div. 134, 71 N. Y. Supp. 227.

⁵²⁷ *Gilbert v. Hotchkiss*, N. Y. Daily Reg., Jan. 2, 1883; following *Gray v. Fisk*, 42 How. Pr. 135, 12 Abb. Pr. (N. S.) 213.

— **Relationship of referee.** If it appears that the referee was possibly influenced by his business or other relations with either party or their attorneys, and such facts were not known to the moving party during the pendency of the hearing before the referee, the report may be set aside because thereof. For instance, the report may be set aside where the reference was ordered in an action against a municipal corporation and the referee had been employed as counsel for the city for some twenty years, where the motion is made by a party who had no knowledge prior to the entry of the judgment of the relations which existed between the referee and the municipal corporation;⁵²⁸ and the fact that the referee received his retainer prior to the time that he was appointed instead of after his appointment is immaterial.⁵²⁹ So where the relations between the referee and the attorney for one of the parties are such as to raise suspicion that the referee was influenced by personal motives in making his report, it should be set aside.⁵³⁰ And the report should be set aside where the referee was one of the firm of attorneys appearing for one of the parties, notwithstanding there is no evidence of unfairness on his part nor of partiality;⁵³¹ or where the referee is acting as counsel in another cause before a referee who is acting as counsel before him.⁵³²

§ 1903. Exceptions.

If the reference is one to hear and determine the issues, the rules apply which relate to exceptions where the trial is by the court without a jury; and such rules, which have already been stated, will not be reiterated.⁵³³ The exceptions referred to in this connection are exceptions to a report on a reference

⁵²⁸, ⁵²⁹ *Fortunato v. City of New York*, 31 App. Div. 271, 52 N. Y. Supp. 872. Retainer while acting as referee. *Stebbins v. Brown*, 65 Barb. 272.

⁵³⁰ *Burrows v. Dickinson*, 35 Hun, 492.

⁵³¹ *Cronon v. Avery*, 42 Misc. 1, 85 N. Y. Supp. 539.

⁵³² *O'Brien v. Long*, 49 Hun, 80, 1 N. Y. Supp. 695; *Carroll v. Lufkins*, 29 Hun, 17.

⁵³³ See ante, §§ 1843-1849.

other than to hear and determine issues. The office of exceptions to a report is, by suitable notice, to call attention to the findings of fact and conclusions of law, which have been made by the referee and which are not assented to by the party objecting.⁵³⁴ Exceptions to the report are proper only where the referee has come to an erroneous conclusion upon some matter referred to him to ascertain and decide, and to report upon, as the immediate subject of the reference. Even where the referee has introduced into his report matters which are wholly irrelevant to the accounts and inquiries directed by the order of reference, exceptions do not lie to his report on that account. If a party against whom a report is irregularly made wishes to set it aside and send it back to the referee to correct the irregularity, he should, instead of excepting to the report, get an order to enlarge the time for excepting; and in the meantime apply to the court to set aside the report for the irregularity, or to have the report referred back again to the referee to hear further testimony where a proper foundation is laid for such a proceeding. And if exceptions are filed after notice of any irregularity in the proceedings before the referee, it is a waiver of the irregularity. The two proceedings were incompatible and entirely inconsistent with each other. The filing of exceptions to a report necessarily presupposes that the report is regularly made, but that the referee has come to a wrong conclusion as to the whole or some of the matters referred to him for his decision.⁵³⁵ The report cannot be excepted to for mere omission to report as to some matters, but the remedy is to move that the report be referred back:⁵³⁶ and the same rule applies where the referee has not found the facts separately from the evidence.⁵³⁷ The general rules of practice provide that in references other than for the trial of the issues in an action or for computing the amount due in foreclosure cases, the report of the referee shall be

⁵³⁴ *Matter of MacFarlane*, 65 App. Div. 93, 72 N. Y. Supp. 723.

⁵³⁵ *Tyler v. Simmons*, 6 Paige, 127.

⁵³⁶ *Stevenson v. Gregory*, 1 Barb. Ch. 72; *Hulce v. Sherman*, 13 How. Pr. 411.

⁵³⁷ *Hulce v. Sherman*, 13 How. Pr. 411.

Art. VI. Report.—Exceptions.

filed with the testimony, which must be signed by the witnesses, and a note of the day of the filing be entered by the clerk in the proper book, under the title of the cause or proceedings; and the report becomes absolute and stands as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter on notice of any party interested therein.⁵³⁸ This mode of reviewing a report on exceptions is in all respects similar to the former practice in chancery.⁵³⁹ This rule does not apply, however, to a reference to hear and determine the issues;⁵⁴⁰ nor to references made for the purpose of aiding the conscience of the court in determining questions pending before it, such as a reference of a disputed question of fact arising on a motion.⁵⁴¹ This rule applies, *inter alia*, to a reference to take and state an account after judgment against defendant in an action for an accounting,⁵⁴² to reports of referees appointed on the final accountings of assignees,⁵⁴³ to the report of the referee on passing the accounts of a receiver,⁵⁴⁴ and to a second reference to take an account where the referee on a previ-

⁵³⁸ Rule 30 of General Rules of Practice. Under Rule 6, subd. 31, of the special term rules in the first district relating to references in insolvency proceedings, exceptions need not be filed to the report. See *Matter of Talmage*, 39 App. Div. 466, 57 N. Y. Supp. 427; *Matter of Kautsky*, 56 App. Div. 440, 67 N. Y. Supp. 882.

⁵³⁹ *Matter of Kautsky*, 56 App. Div. 440, 67 N. Y. Supp. 882.

⁵⁴⁰ *Schaettler v. Gardiner*, 4 Daly, 56, 41 How. Pr. 243.

⁵⁴¹ *Martin v. Hodges*, 45 Hun. 38, 9 State Rep. 423, 27 Wkly. Dig. 47; *Sproull v. Star Co.*, 27 Misc. 27, 56 N. Y. Supp. 1001; *Ward v. Ward*, 16 Abb. N. C. 256; *Matter of Attorney General v. Continental Life Ins. Co.*, 64 How. Pr. 93; *Doremus v. Doremus*, 76 Hun. 337, 27 N. Y. Supp. 1039; *Winfield v. Stacom*, 40 App. Div. 95, 57 N. Y. Supp. 563.

⁵⁴² *Rust v. Hauselt*, 46 Super. Ct. (14 J. & S.) 22; *Niebuhr v. Schreyer*, 22 Abb. N. C. 12, 2 N. Y. Supp. 413; *Ketchum v. Clark*, 22 Barb. 319.

⁵⁴³ *Matter of Kautsky*, 56 App. Div. 440, 67 N. Y. Supp. 882; *Matter of Talmage*, 39 App. Div. 466, 57 N. Y. Supp. 427.

⁵⁴⁴ *Matter of Guardian Sav. Inst.*, 9 Hun. 267; *People v. Empire Mut. Life Ins. Co.*, N. Y. Daily Reg., Oct. 19, 1883.

ous reference to hear and determine has merely reported that plaintiff is entitled to an account.⁵⁴⁵

The practice is for the party excepting to the report to cause it to be filed and to give notice of the filing to the adverse party. No copy of the report need be served. The adverse party has eight days after the service of notice of the filing within which to file exceptions.⁵⁴⁶ Failure to file exceptions to the report of the referee, where the reference is one embraced in this rule of practice, precludes its being questioned and the report becomes absolute and stands confirmed without a motion to confirm.⁵⁴⁷ But the usual practice in such case is for the party in whose favor the report is made, and who causes it to be filed, to present to the court proof by affidavit that the report was filed and that notice of the filing was served on the opposite party more than eight days before, accompanied with a certificate of the clerk made after the expiration of the time to serve exceptions that no exceptions have been served, on which he is entitled as of right to an order confirming the report.⁵⁴⁸ It will be observed that in order to start the eight days running, notice of the filing of the report must be served,⁵⁴⁹ and this is true though the attorney did not appear before the referee.⁵⁵⁰ A party who has appeared in the case at any stage thereof is entitled to notice of the filing of the report;⁵⁵¹ and where a person was actually a party to the hearing before the referee and appeared and participated in the proceeding, the mere fact that he served

⁵⁴⁵ Niebuhr v. Schreyer, 15 Daly, 35, 22 Abb. N. C. 12, 18 State Rep. 814, 2 N. Y. Supp. 413.

⁵⁴⁶ Notice should be served on attorney. Martine v. Lowenstein, 6 Hun, 225.

⁵⁴⁷ Catlin v. Catlin, 2 Hun, 378; Matter of Kautsky, 56 App. Div. 440, 67 N. Y. Supp. 882; Bearup v. Carraher, 5 Wkly. Dig. 558. This applies to a reference in an action for divorce. Gade v. Gade, 14 Abb. N. C. 510.

⁵⁴⁸ James v. Horn, 19 App. Div. 259, 46 N. Y. Supp. 187; Bailey v. Carter, 34 Misc. 270, 69 N. Y. Supp. 616.

⁵⁴⁹ Martine v. Lowenstein, 6 Hun, 225.

⁵⁵⁰ Amsdell v. Martin, 20 Wkly. Dig. 370.

⁵⁵¹ Martine v. Lowenstein, 6 Hun, 225.

no notice of appearance in the action does not preclude his right to notice of the filing of the referee's report, and where such notice was not served on him, he is entitled to file and insist on his exceptions against the report of the referee, though the eight days have expired.⁵⁵²

Furthermore the testimony taken must be filed with the report in order to set running the time within which exceptions must be filed.⁵⁵³

Under the former chancery practice, however, there were cases in which the court directed the master to review his report without requiring exceptions to be taken; or if taken, would direct it to be reviewed on other grounds than those covered by the exceptions; and it is presumed the same is true under the present practice.⁵⁵⁴ If, on the report being filed, the parties are required summarily to show cause why the report should not be confirmed, the unsuccessful party may object that the facts decided are not established by any proof though no exceptions have been filed.⁵⁵⁵ So where the reference is to report facts to aid the court, the question arising on the facts found may be reviewed on appeal without exceptions, but questions not depending on the facts found but on error in the proceedings on the trial must be raised by exceptions.⁵⁵⁶

— **Time.** The exceptions must be filed and served within eight days from the service of notice of the filing of the report, though this rule of practice is not so obligatory as to prevent the court from allowing exceptions to be filed after the time has passed.⁵⁵⁷

— **Who may except.** All parties to the action who are interested in the matter in question may except to the report.⁵⁵⁸ And where there are several sets of parties, appearing by

⁵⁵² *Platt v. Platt*, 13 State Rep. 403.

⁵⁵³ *Pope v. Perault*, 22 Hun, 468.

⁵⁵⁴ 3 Wait, Pr. 383; 1 Van Santvoord, Eq. Pr. 565.

⁵⁵⁵ *Savage v. Sherman*, 87 N. Y. 277, 286.

⁵⁵⁶ *Marshall v. Smith*, 20 N. Y. 251.

⁵⁵⁷ *Matter of Attorney-General v. Continental Life Ins. Co.*, 64 How. Pr. 93; *Ward v. Ward*, 29 Abb. N. C. 256.

⁵⁵⁸ *Matter of Kautsky*, 56 App. Div. 440, 67 N. Y. Supp. 882.

different attorneys, they may, if they are not disposed to join, each take exceptions, though their grounds of exception are the same.⁵⁵⁹ Creditors who have established their claims before the referee are also permitted to except to the report, although not parties to the suit.⁵⁶⁰ It cannot be urged that a party cannot file exceptions to the report of a referee where he had an opportunity to attend and present his case and failed so to do, where he has been treated as a party through the whole proceeding and has appeared by attorney therein, and where the party raising the question has brought the exceptions to a hearing, and seeks to have them overruled on the merits.⁵⁶¹ But where a party does not appear before the referee and object to the testimony offered or to the amount of the claims made, he is precluded from raising that objection on exceptions to the referee's report.⁵⁶²

—**Sufficiency.** In preparing the exceptions, care should be taken to make them specific and point out the precise thing objected to, and the exception should cover all the grounds of objections. Exceptions must be in writing and must be specific,⁵⁶³ i. e., they must definitely indicate what findings and conclusions are excepted to and give notice to the opposing party of the question to be presented.⁵⁶⁴ Exceptions are in the nature of a special demurrer and the party objecting must point out the error; the part not excepted to will be taken as admitted.⁵⁶⁵ A general exception is sometimes sufficient, but where one general exception is taken to a report including several distinct matters, and the report appears right in any part, the exception will be overruled.⁵⁶⁶ A general exception to "each of the conclusions of law," when there are several, is insufficient to raise any specific question.⁵⁶⁷ The

⁵⁵⁹ 2 Barbour, Ch. Pr. 553.

⁵⁶⁰ 3 Wait, Pr. 385.

⁵⁶¹ Matter of Kautsky, 56 App. Div. 440, 67 N. Y. Supp. 882.

⁵⁶² Matter of Little, 47 App. Div. 22, 62 N. Y. Supp. 27.

⁵⁶³ Levy's Accounting, 1 Abb. N. C. 177.

⁵⁶⁴ Matter of MacFarlane, 65 App. Div. 93, 72 N. Y. Supp. 723.

⁵⁶⁵ 2 Barbour, Ch. Pr. 552; Wilkes v. Rogers, 6 Johns. 566.

⁵⁶⁶ 2 Barbour, Ch. Pr. 552.

⁵⁶⁷ Hepburn v. Montgomery, 5 Civ. Proc. R. (Browne) 244, 249.

exceptions must relate to the report and not to proceedings on the reference.⁵⁶⁸ Thus an exception to a finding in a report will not suffice to raise a question as to the admissibility of evidence.⁵⁶⁹ No question which might have been raised before the referee but which was not raised can be raised by exceptions filed after the report is made and filed.⁵⁷⁰ The exceptions must be signed by counsel.⁵⁷¹

— Form of exceptions.

[Title of cause.]

Please take notice of the following exceptions taken by —, the above —, to the report of —, dated the — day of —, 190—.

First exception. That —.

Second exception. That —.

And the said — excepts to the said report as above specified, and demands that it may be reversed or modified accordingly.

[Date.]

A. X.,

[Address.]

Attorney for —.

§ 1904. Confirmation and hearing of exceptions.

Keeping in mind that no motion to confirm is necessary where the reference is to hear and determine the issues, the hearing on the report under an interlocutory reference will now be considered. Exceptions having been filed, the next step is to bring them on for hearing which may be at any special term thereafter on the notice of any party interested therein.⁵⁷² The usual practice is for the successful party to make a motion to confirm the report whereupon the hearing is based on the exceptions filed. The motion to confirm is usually made at a special term,⁵⁷³ but may be made at a trial

⁵⁶⁸ 3 Wait, Pr. 384.

⁵⁶⁹ Gibson v. Stetzer, 3 Hun, 539.

⁵⁷⁰ Matter of Kautsky, 56 App. Div. 440, 67 N. Y. Supp. 882.

⁵⁷¹ 2 Barbour, Ch. Pr. 552.

⁵⁷² Rule 30 of General Rules of Practice.

⁵⁷³ Gautier v. Douglas Mfg. Co., 39 Hun, 642; Sproull v. Star Co., 45 App. Div. 575, 61 N. Y. Supp. 404. Rule in first district. Empire Bldg. & Mut. Loan Ass'n v. Stevens, 8 Hun, 515. A special term may refuse

term at which the same judge who held the special term where the order of reference was made is then sitting.⁵⁷⁴ If no exceptions have been filed, it is not necessary to move to confirm though the usual practice is to do so, as already stated.⁵⁷⁵ It is not necessary to move to confirm where the reference is made solely for the purpose of aiding the conscience of the court in determining questions pending before it, but the report may be reviewed when the evidence and report are brought before the special term, and again by an appeal from an order made by the special term thereon.⁵⁷⁶ The motion being based upon the report, the only questions preserved for review are the regularity of the proceedings and whether the conclusions of law are sustained by the findings of fact appearing in the report. The rulings made on the hearing in the admission and rejection of evidence and questions as to whether the evidence sustains and justifies the findings of fact can only be brought up upon a case containing exceptions. It is the usual and customary practice for the defeated party to move upon a case containing exceptions for a new trial at the same time that the motion is made for a confirmation of the referee's report, so as to have all the questions determined in the one motion. But the motion for new trial upon a case and exceptions may be made after the referee's report has been confirmed.⁵⁷⁷ A party who moves to confirm the report waives any exceptions which he has previously filed thereto.⁵⁷⁸

Either party interested in the report may be heard in support of the report but only the exceptant's attorney can be

to confirm the report of the referee but it has no power to direct judgment contrary to the report of the referee. *Bauer v. Bauer*, 42 Misc. 557, 87 N. Y. Supp. 607.

⁵⁷⁴ *Hinman v. Devlin*, 40 App. Div. 234, 57 N. Y. Supp. 1037.

⁵⁷⁵ See ante, § 1903.

⁵⁷⁶ Motion is proper where term of office of judge granting reference has expired. *Frost v. Reinach*, 81 N. Y. Supp. 246.

⁵⁷⁷ *Eighmie v. Strong*, 49 Hun, 18, 1 N. Y. Supp. 502; *Baumann v. Moseley*, 63 Hun, 492, 494, 18 N. Y. Supp. 563.

⁵⁷⁸ *Matter of Potter*, 10 Daly, 123.

heard in support of the exceptions.⁵⁷⁹ Upon the hearing of the exceptions, the party excepting must furnish the necessary papers for the court, copies of the report, exceptions, and pleadings.⁵⁸⁰ The hearing is confined to the report, the testimony filed, and the exceptions; except where the reference is merely to report to aid the conscience of the court, in which case the court may look to the pleadings and receive other evidence and consider any stipulations offered and admissions of the parties.⁵⁸¹ Where no exceptions have been filed, a motion made to confirm the report must be granted as a matter of course⁵⁸² except where the reference is not merely to aid the conscience of the court in which case the motion can be resisted at special term on any ground appearing in the record, without exceptions having been filed to the report, but after the questions of fact and of law have been finally determined by the special term, exceptions to its decisions should be filed in order to successfully challenge the decision.⁵⁸³ The admission of incompetent testimony, where immaterial or not objected to, is not ground for refusing to confirm.⁵⁸⁴ Affidavits made subsequent to the report cannot be read nor can any evidence be read which was not used before the master and entered in his report as having been read.⁵⁸⁵ On a motion to confirm, the order of reference cannot be attacked and set aside.⁵⁸⁶

— **Time.** All the parties who have appeared may consent in writing to waive the delay of eight days for the confirmation of the report and have it confirmed at once.⁵⁸⁷ So where defendant does not appear, the report may be presented to the court for final order of confirmation and judgment without waiting eight days.⁵⁸⁸

⁵⁷⁹ 2 Barbour, Ch. Pr. 554.

⁵⁸⁰ 3 Wait, Pr. 388.

⁵⁸¹ Gregory v. Campbell, 16 How. Pr. 417, 419.

⁵⁸² Rust v. Hauselt, 46 Super. Ct. (14 J. & S.) 22.

⁵⁸³ Doremus v. Doremus, 76 Hun, 327, 27 N. Y. Supp. 1039.

⁵⁸⁴ Lincoln v. Lincoln, 29 Super. Ct. (6 Rob.) 525.

⁵⁸⁵ 2 Barbour, Ch. Pr. 554.

⁵⁸⁶ Mutual Life Ins. Co. v. Cranwell, 32 State Rep. 376, 10 N. Y. Supp. 404.

⁵⁸⁷, ⁵⁸⁸ Somers v. Milliken, 7 Abb. Pr. 524.

— **Order.** The order either confirms the report and overrules the objections, or sustains the objections and corrects the report or sends the report back to the referee, or allows the exceptions in part and overrules them in part and directs the referee to review his report as to the part relating to the exceptions allowed.⁵⁸⁹ It often occurs that, on the argument of exceptions, the court deems it proper, before it comes to a decision on the subject-matter of the exception, to send it back to the referee to supply some defect in his report or to inquire into some facts which may be necessary to enable the court to come to a proper conclusion;⁵⁹⁰ but, as hereafter stated, the sending of a report back to the referee is not ordinarily proper except in case of a clerical error or omission.⁵⁹¹ If the allowance of the exceptions or any of them renders it necessary to refer it back to the referee, an order is made referring it back to him to review his report, and the reservation of further directions and of the costs of the suit is continued until after the referee shall have made his report. If the exceptions, or any of them, are allowed, and it is not necessary to refer the report back to the master to be reviewed, the hearing of the cause on further directions may be proceeded with in the same manner as if the exceptions had been overruled. If the exceptions are overruled, it has all the effect of confirming the report absolutely, and if the cause has been set down to be heard on further directions to come on at the same time with the hearing of the exceptions, the court proceeds at once to hear the cause on further directions.⁵⁹² On the allowance of an exception to a report as to the amount of damages sustained, the court can modify the report and settle the amount without referring it back to the referee.⁵⁹³

⁵⁸⁹ 2 Barbour, Ch. Pr. 556. If the referee, in an individual creditor's suit, proceeds to a general accounting, when not necessary in order to satisfy plaintiff's claim, his report should be confirmed only as to plaintiff's claim and its payment, and set aside in other respects. Heywood v. Kingman, 29 Abb. N. C. 75, 19 N. Y. Supp. 321, 882.

⁵⁹⁰ 2 Barbour, Ch. Pr. 555.

⁵⁹¹ See ante, § 1905.

⁵⁹² 2 Barbour, Ch. Pr. 555.

⁵⁹³ Taylor v. Read, 4 Paige, 561.

In a proper case, confirmation may be suspended until the happening of some other event.⁵⁹⁴ The order of confirmation may be without prejudice to an application to the court to have the case reopened and to have the answer and interlocutory judgment amended so as to authorize further evidence and the case sent back to the referee to consider such further evidence.⁵⁹⁵ The order of confirmation should be vacated where no notice of the motion to confirm was given in a case where exceptions are not required to be filed.⁵⁹⁶ The order confirming the report and the interlocutory judgment may be modified on the hearing of the motion for final judgment.⁵⁹⁷

— **Effect.** The confirmation of a report of a referee under a reference to determine facts arising on a motion is not conclusive on the court,⁵⁹⁸ and the confirmation of the report does not determine the motion.⁵⁹⁹ This rule of practice as to exceptions does not deprive the court of the power to cancel a report for good cause,⁶⁰⁰ nor does it take away from the court its discretionary power of modifying the report, where the sole purpose of the reference is to aid the court in arriving at a just disposition of a certain question.⁶⁰¹

— **Appeal.** An appeal lies to the appellate division from an order confirming the report of a referee. On the appeal, where exceptions have been filed, the only questions presented by the appeal are those raised by the exceptions.⁶⁰²

§ 1905. Sending case back to referee.

If the report of the referee is insufficient or defective, it may be sent back to him, in a proper case, either by the trial

⁵⁹⁴ *Taacks v. Schmidt*, 18 Abb. Pr. 307.

⁵⁹⁵ *Dyer v. Dyer*, 17 Misc. 421, 41 N. Y. Supp. 198.

⁵⁹⁶ *Sproull v. Star Co.*, 27 Misc. 27, 56 N. Y. Supp. 1001.

⁵⁹⁷ *Smith v. Gilliatt*, 22 Misc. 246, 49 N. Y. Supp. 614.

⁵⁹⁸ *Martin v. Hodges*, 45 Hun, 38, 40.

⁵⁹⁹ *Id.*; *Rovnianek v. Kossalko*, 61 App. Div. 486, 70 N. Y. Supp. 36.

⁶⁰⁰ *Willson & Adams Co. v. Schorpp*, 41 State Rep. 471, 16 N. Y. Supp. 823.

⁶⁰¹ *Ward v. Ward*, 29 Abb. N. C. 256, 21 N. Y. Supp. 795.

⁶⁰² *Matter of Talmage*, 39 App. Div. 466, 57 N. Y. Supp. 427.

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court or by the appellate court. The practice of sending a case back to a referee for further findings⁶⁰³ or to have the referee give his opinion as to the testimony,⁶⁰⁴ or to state separately the findings of fact and conclusions of law,⁶⁰⁵ or to take additional evidence,⁶⁰⁶ or to correct clerical errors or omissions, has been followed to some extent in this state; but the practice of sending a report back to supply alleged omissions is not to be encouraged and should not be allowed except to supply some mere technical or clerical omission.⁶⁰⁷ And it would seem that in references to hear and determine, this rule should be strictly applied.⁶⁰⁸ Where the referee has fully exercised powers given to him under the order of reference, he should not be reinvested with such function for the purpose of more deliberately reconsidering questions passed on and decided.⁶⁰⁹ On a motion to vacate a judgment entered on the report of a referee which is insufficient because not stating the facts found and conclusions of law, it is proper to refuse to have the case sent back to the referee for further findings or decision,⁶¹⁰ especially where the time within which he might act has expired and notice has been served terminating

⁶⁰³ *Rogers v. Beard*, 20 How. Pr. 282; *Lane v. Borst*, 28 Super. Ct. (5 Rob.) 609; *Manley v. Insurance Co. of North America*, 1 Lans. 20; *Van Slyke v. Hyatt*, 46 N. Y. 259; *Potter v. Carpenter*, 71 N. Y. 74; *Snook v. Fries*, 19 Barb. 313; *Fairman v. Brush*, 27 Abb. N. C. 197, 60 Hun, 442, 39 State Rep. 231, 21 Civ. Proc. R. 155, 15 N. Y. Supp. 44. *Contra*, *Gardiner v. Schwab*, 34 Hun, 582.

⁶⁰⁴ *Matter of Stewart*, 3 Month. Law Bul. 91.

⁶⁰⁵ *Gove v. Hammond*, 48 How. Pr. 385.

⁶⁰⁶ *New York & Western Union Tel. Co. v. Jewett*, 16 Wkly. Dig. 419; *Mildeberger v. Mildeberger*, 12 Daly, 195. Such a motion may be denied. *Morgan v. Taylor*, 15 Daly, 302, 23 State Rep. 960, 5 N. Y. Supp. 922.

⁶⁰⁷ *First Nat. Bank v. Levy*, 41 Hun, 461; *Petrie v. Trustees of Hamilton College*, 92 Hun, 81, 36 N. Y. Supp. 636; *Rowlands v. Young Men's Christian Ass'n*, 32 Misc. 421, 66 N. Y. Supp. 577.

⁶⁰⁸ *Rowlands v. Young Men's Christian Ass'n*, 32 Misc. 421, 66 N. Y. Supp. 577.

⁶⁰⁹ *Craig v. Craig*, 66 Hun, 452, 21 N. Y. Supp. 241.

⁶¹⁰ *Rowlands v. Young Men's Christian Ass'n*, 32 Misc. 421, 66 N. Y. Supp. 577.

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the reference.⁶¹¹ If the facts are not warranted by the evidence, the report should not be sent back.⁶¹² So a supplementary report should not be required where the original report is substantially sufficient.⁶¹³ If the cause has been submitted to a referee, it would seem that the court has no power after the referee has discharged his duties to revive the powers of the referee and compel the witness to produce books and papers which the referee had not directed to be produced.⁶¹⁴ Where referees certify to the court that they have overlooked a circumstance connected with the accounts, and request the same sent back for re-examination, the court should set aside the report and send back the accounts.⁶¹⁵ If the reference was premature, the court may refer the matter back to the same referee with directions to report the evidence taken on the first reference with liberty to either party to introduce further evidence.⁶¹⁶ The court, at special term, may send back the referee's report where it is so materially defective as not to pass on all the issues, but such power should not be exercised where the aggrieved party has excepted to the report on that ground.⁶¹⁷ So the court may open the case and send back the report for the purpose of allowing the referee to make a ruling and to permit an exception to be taken thereto.⁶¹⁸ If the report is incomplete and unsatisfactory, the matter may be recommitted to the same referee for further hearing.⁶¹⁹ After a judgment is entered on the report of the referee, the court has no power to order a further hearing before the referee and to provide that on the coming in of his report a motion may be made to amend

⁶¹¹ *Rowlands v. Young Men's Christian Ass'n*, 32 Misc. 421, 66 N. Y. Supp. 577.

⁶¹² *Marston v. Johnson*, 13 How. Pr. 93.

⁶¹³ *Cafferty v. Keeler*, 12 Wend. 291.

⁶¹⁴ *Guinan v. Allan*, 40 App. Div. 137, 57 N. Y. Supp. 614.

⁶¹⁵ *Brittingham v. Stevens*, 1 Super. Ct. (1 Hall) 379.

⁶¹⁶ *Roberts v. White*, 73 N. Y. 375.

⁶¹⁷ *Brown v. New York Cent. R. Co.*, 26 How. Pr. 32.

⁶¹⁸ *Berrian v. Sanford*, 1 Hun, 625, 4 T. & C. 655.

⁶¹⁹ *Southard v. Franco-American Trading Co.*, 15 Civ. Proc. R. (Browne) 112, 16 State Rep. 1008, 1 N. Y. Supp. 603.

the judgment, but the proper practice in such a case is for the special term to vacate the judgment and send the case back to the referee for a further hearing and new trial.⁶²⁰

It is sometimes unnecessary, on the allowance of an exception, to send back the report but the court may modify it itself. Errors appearing on the face of the report may be amended by the court, though no exception has been taken.⁶²¹ So where the report shows the facts, an erroneous estimate may be corrected without sending back the report.⁶²² So where the referee to "inquire and report" finds the facts correctly but draws erroneous conclusions of law, the special term may correct them without sending the report back;⁶²³ and it seems that this rule applies to a reference to "try the issues."⁶²⁴

An order setting aside the report of a referee and sending it back to the referee for further hearing may be conditioned on a limiting of the time allowed for cross-examination and direct examination of the witness.⁶²⁵ An order granting leave to a party to apply to a referee for a further report is not irregular for want of a specification of the points upon which a report is desired.⁶²⁶

The appellate division has the same power to send the case back to the referee to have the grounds of its decision stated as has the court at special term.⁶²⁷

— **Appointment of new referee.** On sending the report back, it is unusual to appoint a new referee unless the report has been set aside because of the misconduct or bias of the referee. If the judgment on the report is reversed on appeal it is proper to not vacate the reference and to send the case

⁶²⁰ *Ferguson v. Bruckman*, 16 App. Div. 67, 44 N. Y. Supp. 812.

⁶²¹ *Safford v. Safford*, 7 Paige, 259; *Bogert v. Furman*, 10 Paige, 496.

⁶²² *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, and see *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. 573.

⁶²³ *Austin v. Ahearne*, 61 N. Y. 6.

⁶²⁴ *Freiot v. La Fountaine*, 16 Misc. 153, 38 N. Y. Supp. 832.

⁶²⁵ *Matter of Davenport*, 37 Misc. 179, 74 N. Y. Supp. 940.

⁶²⁶ *Union Bank v. Mott*, 13 Abb. Pr. 247.

⁶²⁷ *Baker v. Moore*, 88 Hun, 458, 34 N. Y. Supp. 874.

back to the same referee except where the reference is by consent, though a new referee is often appointed in such a case. Where the report of the referee is informal and incomplete so that it may be set aside, but there has been a long trial before the referee with large expenses, the court should not appoint a new referee to try the case *de novo* where no misconduct is alleged, but should send the case back to the same referee so that he may complete the trial.⁶²⁸ But where a referee to hear and determine all the issues and take an account, if necessary, decides that an accounting should be had and then declines to proceed further, he may be ordered to complete his duty or the case may be sent to another referee to complete it without beginning the cause anew.⁶²⁹

— **Procedure before referee on return of report.** Where the report is sent back, the referee should confine himself to the act or acts mentioned in the order which refers back the report. But if the report is sent back for revision and correction, and he goes beyond correcting the errors complained of, and reopens the case as to other items, he is bound to hear any additional testimony which is offered which pertains to such items.⁶³⁰ Where the report is referred back to have the referee incorporate in his report all the facts found by him, he is not authorized to make entirely new findings.⁶³¹

— **Amended report.** It seems that the report may be amended, pursuant to an order of court, under circumstances which might have vitiated the original report. Thus, an amended report made while the referee is in a foreign country is not invalid because made outside the jurisdiction.⁶³² So a new trial is not necessary where the referee, after report, has been required to amend it, but dies before so doing.⁶³³

⁶²⁸ *Maicas v. Leony*, 113 N. Y. 619.

⁶²⁹ *Mundorff v. Mundorff*, 1 Hun, 41, 3 T. & C. 171.

⁶³⁰ *Goulard v. Castillon*, 12 Barb. 126.

⁶³¹ *Shea v. Cornish*, 29 Abb. N. C. 289, 22 N. Y. Supp. 168.

⁶³² *Cooley v. Decker*, 47 How. Pr. 188.

⁶³³ *Juliand v. Grant*, 34 How. Pr. 132.

§ 1906. Entry of judgment.

The power of the clerk to enter judgment on the report depends on the nature of the reference.

— **Where reference is to determine all the issues.** The Code provides that where the whole issue is an issue of fact the report stands as a decision of the court, and, except where it is otherwise expressly prescribed by law, judgment may be issued thereon by the clerk as directed therein, on filing the report.⁶³⁴ This does not apply, however, to matrimonial actions.⁶³⁵ The report of a referee appointed to hear and determine the issue has the same force and effect in all respects as the decision of the justice of the court after a trial at special term.⁶³⁶ It will be noticed that this provision applies only where the reference is to hear and determine all the issues. The judgment must be entered in precise accordance with the directions in the report. The duties of the clerk are simply clerical, and he is only to determine whether the judgment proposed is in the exact language of the judgment directed to be entered by the report or decision. If it is not, he cannot determine whether or not it is substantially the same.⁶³⁷ The settled practice is to enter such a judgment with the same caption and conclusion as if directed in open court, and the date of the caption is usually that of the entry, even though the entry be made in vacation.⁶³⁸ But while the court, in such a case, cannot direct a different judgment from that which the referee has directed, it may put an informal report into the form of a judgment either by framing the judgment or referring it to a referee to report a proper form of judgment.⁶³⁹ The mere signing, without filing or delivery, of the report, to one of the parties, does not constitute a “rendering” of such report as to authorize entry of final judgment against a party

⁶³⁴ Code Civ. Proc. § 1228; *Ward v. Kilpatrick*, 1 Month. Law Bul. 31.

⁶³⁵ Code Civ. Proc. § 1229.

⁶³⁶ *Kennedy v. McKone*, 10 App. Div. 97, 41 N. Y. Supp. 577.

⁶³⁷ *Maicas v. Leony*, 22 Abb. N. C. 1, 50 Hun, 178, 19 State Rep. 705, 2 N. Y. Supp. 831.

^{638, 639} Note in 22 Abb. N. C. 8.

who dies after the signing of the report but before it is filed or delivered.⁶⁴⁰

— **Where part of the issues are referred.** Where there are several issues and the issue last tried is tried before a referee, his report must award the proper judgment on the whole issue unless otherwise prescribed in the order of reference;⁶⁴¹ and it would seem that judgment may be entered by the clerk. The same rule applies where the reference is to report on one or more specific questions of fact, arising on the issue, where the other issues have been tried.⁶⁴² If the reference be of but one or more of the issues of fact, leaving others still undetermined, the notice served with the copy of the report should be that the party will bring the cause to trial and move on the issues so found and other issues to be determined by the court for judgment.⁶⁴³

— **Where reference is interlocutory.** If the reference is an interlocutory one, and not embraced in the preceding section, judgment cannot be entered on the report by the clerk except where the order of reference so provides.⁶⁴⁴ The report of the referee, to whom is referred disputed questions of fact arising on a motion, is in no wise binding on the court, who can accept or reject the conclusions of the referee as the court may see fit;⁶⁴⁵ though the opinion is entitled to respectful consideration.⁶⁴⁶ A reference ordered to examine and report the facts with the opinion of the referee thereon is simply to supply the court with information.⁶⁴⁷ And a reference though in form to hear and determine but in fact one to take evidence and report to the court does not render the report conclusive on the court.⁶⁴⁸ The report of a referee on a reference to take proof of facts constituting alleged contempt is not conclusive,

⁶⁴⁰ *Clark v. Pemberton*, 64 App. Div. 416, 72 N. Y. Supp. 232.

⁶⁴¹ Code Civ. Proc. § 1221, subd. 3.

⁶⁴² Code Civ. Proc. § 1226.

⁶⁴³ 1 Van Sant. Eq. Pr. 499.

⁶⁴⁴ Code Civ. Proc. §§ 1230, 1231. See note in 22 Abb. N. C. 8.

⁶⁴⁵ *Marshall v. Meech*, 51 N. Y. 140.

⁶⁴⁶ *Woodford v. Rasbach*, 6 Civ. Proc. R. (Browne) 315.

⁶⁴⁷ *Muhlenbrinck v. Pooler*, 40 Hun, 526.

⁶⁴⁸ *Dean v. Driggs*, 82 Hun, 561, 64 State Rep. 183, 31 N. Y. Supp. 548.

and on its coming in affidavits used upon the motion on which the reference was ordered may be considered in passing on it.⁶⁴⁹

§ 1907. Review on appeal and subsequent procedure.

The report of a referee, like the verdict of a jury, must be deemed conclusive as to disputed questions of fact, even though the appellate court might arrive at a different conclusion from the evidence, if there is some evidence to support the finding.⁶⁵⁰ The court on appeal will infer the existence of facts to sustain the judgment though not found in the report, where the evidence would have warranted the finding of it.⁶⁵¹ But a report will be set aside where many of the material facts found are contrary to the evidence.⁶⁵² It would seem that where it is sought to review, on appeal, rulings made on a hearing as to the admission or rejection of evidence, or as to whether the evidence sustains the findings of facts, a motion for a new trial on a case and exceptions must be made in the first instance at the special term.⁶⁵³ But one who has unsuccessfully opposed the confirmation of the report of a referee may appeal from the judgment entered thereon, although he has not first moved to have the report set aside and for a new trial.⁶⁵⁴ If the referee makes a general and a special report, the general report may be disregarded on appeal as superfluous.⁶⁵⁵

After reversal on appeal and the sending the case back to the referee for a determination, the referee may properly allow

⁶⁴⁹ Fenlon v. Dempsey, 21 Abb. N. C. 291.

⁶⁵⁰ Scattergood v. Wood, 14 Hun, 269; Howell v. Biddlecom, 62 Barb. 131; Robinson v. Hopkins, 3 State Rep. 267; Eaton v. Benton, 2 Hill, 576; Davis v. Allen, 3 N. Y. (3 Comst.) 168; Vansteenburgh v. Hoffman, 15 Barb. 28.

⁶⁵¹ DeWitt v. Montjo, 46 App. Div. 533, 61 N. Y. Supp. 1046.

⁶⁵² Sackett v. New York & N. H. R. Co., 21 Super. Ct. (8 Bosw.) 228.

⁶⁵³ Baumann v. Moseley, 63 Hun, 492, 45 State Rep. 344, 18 N. Y. Supp. 563.

⁶⁵⁴ Kellogg v. Clark, 23 Hun, 393.

⁶⁵⁵ Niles v. Battershall, 18 Abb. Pr. 161, 27 How. Pr. 381, 25 Super. Ct. (2 Rob.) 146.

plaintiff to amend his complaint so as to base his action on mistake instead of fraud.⁶⁵⁶ But where it is provided that testimony taken before a former referee shall be used, it is in the discretion of the new referee whether the same witnesses shall be permitted to testify before him.⁶⁵⁷ A referee stands in the place of a jury in that if the judgment is reversed on a question of law the referee must conform to the law of the case as declared by the appellate court, but where a decision is reversed on the facts, he stands in the same situation as a jurymen and must find the facts solely on the evidence presented.⁶⁵⁸ Where the report of a referee, appointed to hear and determine all the issues, fails to dispose of a counterclaim, the report should be set aside, but where there is no suggestion of misconduct on the part of the referee, the case should be submitted to the same referee to hear and determine.⁶⁵⁹

⁶⁵⁶ Knapp v. Fowler, 30 Hun, 512.

⁶⁵⁷ Griffin v. Miner, 54 Super. Ct. (22 J. & S.) 46, 3 State Rep. 521.

⁶⁵⁸ Adams v. Olin, 64 Hun, 268, 18 N. Y. Supp. 899.

⁶⁵⁹ Pinsker v. Pinsker, 44 App. Div. 501, 60 N. Y. Supp. 902.

PART IX.

CASE AND EXCEPTIONS.

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— On moving for new trial.

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§ 1908. Nature and purpose.

Both the Code and the General Rules of Practice refer to a case, exceptions, and a case containing exceptions, as though there was a practical difference between them: but, in gen-

Nature and Purpose.

eral, it matters not, in so far as the practice is concerned, whether the one term is used or the other.¹ Thus it has been held that the proposed "case" on appeal provided for by the Code embraces what was formerly known and is still described in the General Rules of Practice as a "bill of exceptions."² Strictly speaking, the difference between a case, a bill of exceptions, and a case containing exceptions, is that in the first there is contained all the evidence so as to bring up for review merely the question as to the sufficiency of the evidence, while in a bill of exceptions, only exceptions taken at the trial are embodied with so much of the evidence as is necessary to explain them, and a case containing exceptions would seem to be a combination of a case and a bill of exceptions.³ Under the practice prior to the Code, a "case" was used only on a motion for a new trial, while a "bill of exceptions" attached to or incorporated into the record was used on a writ of error. The practice prevailed of using the bill of exceptions "as a case" for the purpose of moving in the lower court for a new trial and also of making a case in the first instance containing a stipulation giving a party leave to turn the case into a bill of exceptions or special verdict if a new trial should be denied.⁴

The preliminary matter immediately following the title of the action, where simply a statement in full of matters required by rule 41 of the General Rules of Practice, does not constitute a case and exceptions.⁵

The office of a case is simply to present the questions which are to be examined with legal and ordinary precision and in a condensed form.⁶

¹ See *Smith v. Grant*, 15 N. Y. 590.

² *Stiasny v. Metropolitan St. R. Co.*, 65 App. Div. 268, 72 N. Y. Supp. 747; *Hubbard v. Chapman*, 28 App. Div. 577, 51 N. Y. Supp. 207; *Winter v. Crosstown St. R. Co.*, 8 Misc. 362, 28 N. Y. Supp. 695.

^{3, 4} *Hastings v. McKinley*, 3 Code R. 10.

⁵ *Delaney v. Valentine*, 11 App. Div. 316, 42 N. Y. Supp. 571.

⁶ *Bissel v. Hamlin*, 20 N. Y. 519.

Necessity.

The use of a case on a motion for a new trial does not preclude a new and different case on appeal from a judgment entered after a denial of the motion,⁷ but the case in the court of appeals must be the one originally prepared and settled for use in the appellate division.⁸

Two independent cases should not be incorporated in one appeal book, but the record on each appeal should be printed by itself so that independent judgment rolls may be made up embracing only the papers applicable to each case.⁹

§ 1909. Necessity.

The Code provides that when a party intends to appeal from a judgment rendered after the trial of an issue of fact or to move for a new trial of such an issue, he must make a case "except where otherwise prescribed by law."¹⁰ So if an appeal is taken from the order made on a motion for a new trial on the judge's minutes, a case must be prepared and settled in the usual manner.¹¹ A case must also be made before the hearing where a verdict has been ordered subject to the opinion of the court.¹² And there is no Code provision dispensing with a case when the appellant intends to review a final judgment entered pursuant to a directed verdict.¹³

It has been said that no question, either of fact or law, "arising on the trial," can be reviewed except on a case made and settled according to established practice.¹⁴ The

⁷ *Leavy v. Roberts*, 8 Abb. Pr. 310.

⁸ *Johnson v. Whitlock*, 13 N. Y. 344. But see Code Civ. Proc. § 1239.

⁹ *Geneva & W. R. Co. v. New York Cent. & H. R. R. Co.*, 24 App. Div. 335, 343, 48 N. Y. Supp. 842.

¹⁰ Code Civ. Proc. § 997.

¹¹ Code Civ. Proc. § 999; *Kenney v. Sumner*, 12 Misc. 86, 33 N. Y. Supp. 95.

¹² Code Civ. Proc. § 1185.

¹³ *Delano v. Harp*, 37 Hun, 275; *Douglass Co. v. Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045.

¹⁴ *McLean v. Cole*, 13 Hun, 300

Necessity.

Code expressly provides, however, that it is not necessary to make a case where a party intends to appeal from a judgment entered on a referee's report, or a decision of the court on a trial without a jury, and to rely only on exceptions taken "after the close of the trial."¹⁵ Such exceptions can only be taken to rulings on questions of law; but inasmuch as the question whether there is any evidence to sustain a finding of fact by the judge or a referee is expressly made a question of law to which an exception may be taken, it follows that if a review of such a question is desired it is not necessary for the appellant to make a case and include the evidence therein, but such duty devolves on the respondent.¹⁶ And the preparation of a case is not necessary to perfect and prosecute an appeal since a party may argue his appeal on the judgment roll alone where he does not desire to present other questions than such as arise on the judgment roll.¹⁷ Failure to prepare and serve a case merely deprives the appellant of using anything on the appeal outside the record.¹⁸ But the rule where, on appeal, a case has been made containing the evidence, that if the findings of facts contained in the record are insufficient to uphold the judgment, then the appellate court may assume that there was evidence on the trial sufficient to justify other findings of fact which would

¹⁵ Code Civ. Proc. § 998; *Douglas v. Douglas*, 11 Hun, 406; *Schwarz v. Weber*, 103 N. Y. 658; *Delaney v. Valentine*, 11 App. Div. 316, 42 N. Y. Supp. 571.

¹⁶ See post, § 1912. And see vol. 2, p. 2386. In 1904, section 1023 of the Code was enacted so as to provide for the submission to the judge or referee, where the trial is without a jury, of requests to find not only on questions of law but also on questions of fact. It also provides that "an exception may be taken to a refusal of the court or referee to find any request thus submitted." It would seem that where findings of fact are refused, the appellant must make a case and include the evidence therein, in order to warrant a review.

¹⁷ *Mellvaine v. Steinson*, 85 App. Div. 562, 83 N. Y. Supp. 285; *Odell v. McGrath*, 16 App. Div. 103, 45 N. Y. Supp. 119.

¹⁸ *Brown v. Hardie*, 28 Super. Ct. (5 Rob.) 678; *Berger v. Dubernet*, 30 Super. Ct. (7 Rob.) 1; *Smith v. Ingham University*, 76 Hun, 605, 23 Civ. Proc. R. (Browne) 393, 59 State Rep. 437, 28 N. Y. Supp. 220.

support the conclusions of law, does not apply when the appeal is on the judgment roll alone and the evidence is not before the court;¹⁹ and in such case the prevailing party should see to it that he has findings of fact sufficient to uphold his judgment, and if he does not he is exposed to the perils of a reversal by an appeal based solely on exceptions to legal conclusions.²⁰ Where a party has elected to appeal simply on the exceptions to the findings of the trial court on questions of law, he cannot be deprived of that right by the opposing party attempting to turn the appeal into one to be heard on a case and exceptions.²¹

In order to enable a party to review, in the court of appeals, a judgment on a verdict directed by the court subject to the opinion of the appellate division, a special case for the court of appeals must be made and settled under the direction of the appellate division, which must contain a concise statement of the facts and questions of law arising thereon.²²

A case need not be made on an appeal from an award made by arbitrators.²³

The death of the stenographer before he has copied his notes, together with counsel's want of recollection as to the details of the testimony, is not ground for granting a new trial because of inability to make up the case on appeal.²⁴

— **On moving for new trial.** It is not necessary to make a case for the purpose of moving for a new trial (1) where the motion is made on the minutes of the judge who presided at a trial by a jury, or (2) where the motion for a new trial is based on an allegation of irregularity or surprise.²⁵ So a motion at special term for a new hearing where a reference has been ordered to report on one or more specific ques-

¹⁹, ²⁰ *Rochester Lantern Co. v. Stiles & P. Press Co.*, 135 N. Y. 209.

²¹ *Delaney v. Valentine*, 11 App. Div. 316, 42 N. Y. Supp. 571.

²² Code Civ. Proc. § 1339; *People v. Featherly*, 131 N. Y. 597.

²³ *In re Poole*, 5 Civ. Proc. R. (Browne) 279, 32 Hun, 215.

²⁴ *Lidgerwood Mfg. Co. v. Rogers*, 56 Super. Ct. (24 J. & S.) 350, 4 N. Y. Supp. 716.

²⁵ Code Civ. Proc. § 998.

Time for Making and Service.

tions of fact, made before the hearing of a motion for final judgment, need not be based on a case unless the court, or a judge thereof, so directs.²⁶ But a motion for a new trial on the ground of newly-discovered evidence must be made on a case and exceptions.²⁷ And where an action has been tried before the court without a jury, a motion for a new trial made merely on exceptions will be refused.²⁸ It should be noticed, however, that the objection to the want of a case may be waived by failure to urge it in the lower court.²⁹

When any specific question of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under the Code and a trial had, if either party desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made on his minutes at the same term of court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases. Such motions shall be made, in the first instance, at special term.³⁰

§ 1910. Time for making and service.

Rule 32 of the General Rules of Practice provides that when it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be

²⁶ Code Civ. Proc. § 1004.

²⁷ *Harris v. Gregg*, 4 App. Div. 615, 38 N. Y. Supp. 844; *Bantleon v. Meier*, 81 Hun, 162, 30 N. Y. Supp. 706; *Davis v. Grand Rapids F. Ins. Co.*, 5 App. Div. 36, 39 N. Y. Supp. 71; *Michel v. Colegrove*, 22 Civ. Proc. R. (Browne) 297, 304, 19 N. Y. Supp. 716.

²⁸ *City Trust, Safe Deposit & Surety Co. v. Wilson Mfg. Co.*, 58 App. Div. 271, 68 N. Y. Supp. 1004.

²⁹ *McIver v. Hallen*, 50 App. Div. 441, 64 N. Y. Supp. 26, which followed *Russell v. Randall*, 123 N. Y. 436.

³⁰ Rule 31 of General Rules of Practice.

made, and a copy thereof served on the opposite party within the following times:

1. If the trial was before the court or a referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon. It will be observed that the mere service of a copy of the judgment with notice of its entry does not limit the time to make a case, but a copy of the decision or report must be served³¹ together with written notice of the entry of judgment thereon. It is not necessary to serve a copy of the judgment. The decision served must be one signed by the judge and not a proposed decision.³² Of course, a party cannot be put in default for not serving a case containing exceptions before the expiration of the time for framing exceptions, i. e., ten days after written notice of entry of judgment.³³

2. In the surrogate's court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

3. If the trial was before a jury, within thirty days after notice of the decision of a motion for a new trial, if such motion be made and not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry. In other words, if the case is to be used on an appeal from an order granting or refusing a new trial, it may be served at any time within thirty days after the decision of a motion for a new trial, provided the motion is made and not decided at the time of the trial;³⁴ but in other cases, where no motion for a new trial made at the time of the trial remains undecided, the proposed case must be served within thirty days after the service of a copy of the judgment and notice of its entry. A written notice that "the foregoing is a copy of the judgment duly entered," etc., where such

³¹ Schwarz v. Weber, 103 N. Y. 658.

³² Kohn v. Manhattan R. Co., 8 Misc. 415, 28 N. Y. Supp. 665.

³³ French v. Powers, 80 N. Y. 146.

³⁴ See Martin v. Platt, 53 Hun, 42, 5 N. Y. Supp. 862.

Time for Making and Service.

copy is neither signed by the clerk nor has inserted therein any amount of costs, is not sufficient notice of entry of judgment to start running the time within which a case and exceptions must be filed.³⁵

The party making the case is not entitled as a matter of right to the use of the stenographer's minutes,³⁶ but the attorney of the adverse party may be ordered to furnish papers necessary to make up the case.³⁷

Repeatedly obtaining extensions on the ground that the time is about to expire estops the party from claiming that by reason of an irregularity in the notice of decision and judgment the time had never begun to run.³⁸

An attorney will not be compelled to accept service of a case where he has never refused to receive it, and has merely neglected to reply to a letter asking him to accept service.³⁹

— **Form of notice to be indorsed on case.**

[Title of action.]

Sir—Take notice that the within is a copy of the case [or "case containing exceptions" or "exceptions"] proposed on behalf of the ——— herein.

[Date.]

[Signature and office address of attorney.]

[Address to opposing attorney.]

— **Form of admission of service of case.**

Due and personal service of the within proposed case is hereby admitted at ———, this ——— day of ———, 190—.

[Signature of attorney.]

— **Extension of time to serve case.** The time for serving a case may be extended,⁴⁰ but not where the right to serve a notice of appeal has expired by limitation, and the case is to

³⁵ *Mason v. Corbin*, 29 App. Div. 602, 51 N. Y. Supp. 178.

³⁶ *Bohnet v. Lithauer*, 7 Hun, 238.

³⁷ *Jackson v. Platt*, 2 Johns. Cas. 71.

³⁸ *Lockwood v. Fox*, 3 Month. Law Bul. 8.

³⁹ *Farley v. Stowell*, 57 App. Div. 218, 68 N. Y. Supp. 119.

⁴⁰ *Odell v. McGrath*, 16 App. Div. 103, 45 N. Y. Supp. 119; *Strong v. Hardenburgh*, 25 How. Pr. 438. Motion should not be made in appellate division. *Matter of Stafford*, 21 App. Div. 476, 47 N. Y. Supp. 688.

be used on appeal.⁴¹ But no order extending the time to serve a case, or a case containing exceptions, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application.⁴²

— **Relief from default.** There is no express provision in the rules as to where applications to relieve from a default in serving a case should be made, but it has been held that the proper practice is to apply to the court from whose judgment the appeal is taken.⁴³

— **Effect of failure to serve case.** Failure to serve a case within the time prescribed by the rules is a waiver of the right of the party so to do;⁴⁴ and such failure authorizes the party not served to apply at the special term for an order declaring that the opposing party must be deemed to have waived his right thereto, and a motion for such an order should be granted, unless the court sees fit to relieve the party from his default and permit him to serve a case.⁴⁵

§ 1911. Amendments.

The party served with a case may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case.⁴⁶ No order extending the time within which amendments to the case may be served shall be made unless the party applying for such order serve a notice of two days upon the adverse parties, of his intention to apply therefor, stating the time and place for making such application.⁴⁷ If he does not propose amendments within said ten days, or obtain an extension of time, he is deemed to have agreed to the case as proposed.⁴⁸

⁴¹ *In re Cluff's Estate*, 11 Civ. Proc. R. (Browne) 338.

⁴² Rule 32 of General Rules of Practice.

⁴³ *Strong v. Hardenburgh*, 25 How. Pr. 438; *Odell v. McGrath*, 16 App. Div. 103, 45 N. Y. Supp. 119. See, also, *McIlvaine v. Steinson*, 85 App. Div. 562, 83 N. Y. Supp. 285.

⁴⁴ Rule 32 of General Rules of Practice.

⁴⁵ *McIlvaine v. Steinson*, 85 App. Div. 562, 83 N. Y. Supp. 285; *Smith v. Ingham University*, 76 Hun, 695, 28 N. Y. Supp. 220.

⁴⁶⁻⁴⁸ Rule 32 of General Rules of Practice.

Amendments.

The adverse party should not serve an entirely new case as an amendment,⁴⁹ except where the proposed case requires, in substance, an entire change.⁵⁰

The amendments proposed should either be written on the case served or on a separate page with a reference to the line and page of the original. And it is usual to require, where the amendments are on a separate paper, that each place where the amendments are proposed to be made or inserted shall be distinctly marked on the case submitted.⁵¹ The party proposing the case or exceptions shall, before submitting the amendments to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes.⁵² A party desiring to insert a considerable portion of the stenographer's notes may properly indicate the proposed amendment by reference to the folios and pages instead of by transcribing the extended passage.⁵³

It is the duty of the respondent to see that sufficient evidence is inserted in the case to show that the findings of fact in a decision by the trial judge or the report of a referee are not entirely without evidence to support them.⁵⁴ So if exceptions have been taken to rulings and appellant fails to include evidence which supports the ruling, the respondent should bring it into the case by amendment.⁵⁵ Thus, if testimony objectionable in itself is admitted on behalf of respond-

⁴⁹ *Eagle v. Alner*, 1 Johns. Cas. 332; *Stuart v. Dinsse*, 16 Super. Ct. (3 Bosw.) 657.

⁵⁰ *Tyng v. Marsh*, 51 How. Pr. 465.

⁵¹ *Stuart v. Binsse*, 17 Super. Ct. (4 Bosw.) 616.

⁵² Rule 32 of General Rules of Practice.

⁵³ *Tyng v. Marsh*, 51 How. Pr. 465.

⁵⁴ *Neiman v. Butler*, 46 State Rep. 928, 19 N. Y. Supp. 403.

⁵⁵ *Hubbard v. Chapman*, 28 App. Div. 577, 51 N. Y. Supp. 207.

ent because of evidence introduced by appellant, it rests on respondent to see that such other testimony is brought into the case by amendment.⁵⁶ An exception appearing in the proposed case serves as a notice to the respondent of an intention to raise the question of error in the ruling excepted to and puts on him the responsibility of adding by amendment any needed proof.⁵⁷

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The case must contain not only the exceptions taken by the losing party but also so much of the evidence, and other proceedings on the trial, as is material to the questions to be raised.⁵⁸ To review a ruling on a motion, on appeal from the judgment, the case must not only show the motion but also a ruling thereon and an exception to the ruling.⁵⁹ And where the discretion of the trial judge in striking matter out of the case on appeal is claimed to have been abused, it is necessary that the papers on which the motion was heard be included in the case.⁶⁰ If a party desires to raise a question on appeal as to the occurrences at the time the jury are polled, the proper practice is to have a statement of the facts settled and inserted in his case on appeal from an order denying his motion for a new trial.⁶¹ If the complaint is dismissed on the merits after a verdict, pursuant to a motion made at the close of the evidence, but the case does not show what answer was given to the several questions because the form of the verdict is not included, the review will be as if no verdict had been rendered.⁶²

⁵⁶ *Davey v. Lohrmann*, 1 Misc. 317, 20 N. Y. Supp. 675.

⁵⁷ *Porter v. Smith*, 107 N. Y. 533.

⁵⁸ Code Civ. Proc. § 997.

⁵⁹ *Pritchard v. Hirt*, 39 Hun, 378; *Goldenson v. Lawrence*, 6 Misc. 227, 26 N. Y. Supp. 541.

⁶⁰ *Niles v. New York Cent. & H. R. R. Co.*, 13 App. Div. 549, 43 N. Y. Supp. 734.

⁶¹ *Lord v. Van Gelder*, 16 Misc. 24, 37 N. Y. Supp. 693; *Weeks v. Hart*, 24 Hun, 181.

⁶² *O'Sullivan v. Knox*, 81 App. Div. 438, 80 N. Y. Supp. 848.

Contents.

If a motion for a new trial is made before the entry of judgment, the case prepared for such motion should be preceded by the pleadings and minutes of trial.⁶³

If an appeal is taken from an order refusing or granting a new trial, the order should be printed at the beginning of the case together with the notice of appeal.⁶⁴ The statement in the case that a motion for a new trial was made and denied, and an exception taken, is not sufficient.⁶⁵

If a judgment has been entered it is not necessary to include in the case anything which appears in the judgment roll. The judgment roll consists, except where special provision is otherwise made by law, of the summons; the pleadings or copies thereof; the final judgment, and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order which in any way involves the merits or necessarily affects the judgment. If the judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in the Code; and the exceptions or case then on file.⁶⁶ It follows that neither the verdict on a jury trial nor the decision of a judge, on a trial without a jury, nor the report of a referee, where the trial is by a referee, need be included. So the opinion of the court need not be inserted in the case, though it should be printed with the case as a part of the appeal papers.⁶⁷ So it is not necessary to state in the case that a finding on the facts or a ruling on the law was made where the finding or ruling appears in a referee's report or in the decision of the court where the trial is without a jury.⁶⁸ And a statement by the judge in answer to an inquiry as to what he ruled is not matter which the

⁶³ Rule 41 of General Rules of Practice.

⁶⁴ *Lewis v. Merritt*, 42 Hun, 161; *Victory v. Foran*, 56 Super. Ct. (24 J. & S.) 507, 4 N. Y. Supp. 392.

⁶⁵ *Coakley v. Mahar*, 36 Hun, 157.

⁶⁶ Code Civ. Proc. § 1237.

⁶⁷ Rule 41 of General Rules of Practice; *Warren v. Warren*, 22 How. Pr. 142.

⁶⁸ Code Civ. Proc. § 997.

party is entitled to have inserted.⁶⁹ On a second appeal, the proceedings on the first trial should not be inserted in the case⁷⁰ nor should the case made on the first trial.⁷¹

The title of the action should be written or printed but once, and such matters as verifications should be merely noted unless the appeal involves some point concerning them.⁷² The statement of the time of the commencement of the action is satisfied by the words "on or about."⁷³ It is sufficient to state that "evidence was offered by * * * tending to prove," followed by a statement of the evidence received, the objection thereto and the ruling thereon.⁷⁴ It is good practice to indicate at the top of each printed page the contents thereof.⁷⁵ The case must be indexed.⁷⁶ If not indexed, it may be stricken from the calendar.⁷⁷ The lines of the case must be numbered and each copy must correspond thereto.⁷⁸ If both parties appeal and make up separate records, each must stand on his particular record.⁷⁹

— **Evidence.** The question arises as to whether the party moving for a new trial, or, in case of an appeal, the appellant, shall include in his case any, all, or a part, of the evidence produced on the trial.

If no question of fact is sought to be reviewed on appeal but only questions of law, i. e., rulings to which exceptions have been taken, the case should include only so much of the evidence as is necessary to present the questions of law on which exceptions were taken at the trial.⁸⁰ It is not necessary

⁶⁹ *Smith v. Coe*, 31 Super. Ct. (1 Sweeny) 385.

⁷⁰ *Bissel v. Hamlin*, 20 N. Y. 519.

⁷¹ *Wilcox v. Hawley*, 31 N. Y. 648.

⁷² *Sickels v. Kling*, 32 Misc. 165, 65 N. Y. Supp. 513.

⁷³ *James v. Work*, 51 State Rep. 323, 22 N. Y. Supp. 123.

⁷⁴ *Hubbard v. Chapman*, 28 App. Div. 577, 51 N. Y. Supp. 207.

⁷⁵ *Foster v. Bookwalter*, 78 Hun, 352, 29 N. Y. Supp. 116.

⁷⁶ Rule 43 of General Rules of Practice.

⁷⁷ *Reid v. City of New York*, 50 State Rep. 758, 21 N. Y. Supp. 719.

⁷⁸ Rule 32 of General Rules of Practice.

⁷⁹ *Black v. Brooklyn Heights R. Co.*, 32 App. Div. 468, 53 N. Y. Supp. 312.

⁸⁰ Code Civ. Proc. § 997; Rule 34 of General Rules of Practice; *Watson*

that the case contain all the evidence.⁸¹ And this is so, if the trial was by jury, though it is sought to review exceptions to the rulings of the trial judge or to his charge which are based on the absence or insufficiency of the evidence,⁸² since it will be assumed that the "prevailing" party has included in the case all the testimony he regards as essential to sustain the ruling.⁸³ Questions withdrawn, answers excluded without objection, and testimony not necessary to raise the questions on the exceptions, should not be included.⁸⁴ But if oral evidence has been rejected, the nature of the evidence offered must be stated in the case to authorize a review of the ruling,⁸⁵ and the party has a right to have his offer of evidence included in the case.⁸⁶ So where a writing is offered in evidence and rejected, it should be marked for identification and incorporated in the case on appeal, or a statement of its contents inserted in the case, so that the appellate court may determine whether it was admissible.⁸⁷ Where, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their exist-

v. Duncan, 29 Misc. 447, 60 N. Y. Supp. 755; Firth v. Rehfeldt, 81 State Rep. 474, 47 N. Y. Supp. 474.

⁸¹ Rule 34 of General Rules of Practice. See *Marckwald v. Oceanic Steam Nav. Co.*, 8 Hun, 547; *Magnus v. Trischet*, 2 Abb. Pr. (N. S.) 175.

⁸² Refusal to direct a verdict. *Rosenstein v. Fox*, 150 N. Y. 354. Directing non-suit. *Zimmerman v. Union R. Co.*, 3 App. Div. 219, 38 N. Y. Supp. 362. Refusal to non-suit. *Miner v. Edison Elec. Illuminating Co.*, 22 Misc. 543, 50 N. Y. Supp. 218. Directing verdict. *Brown v. James*, 2 App. Div. 105, 37 N. Y. Supp. 105. See, also, *Meislahn v. Irving Nat. Bank*, 65 App. Div. 244, 72 N. Y. Supp. 492, denying motion for reargument of decision reported in 62 App. Div. 231, 70 N. Y. Supp. 988.

⁸³ *Murphy v. Hays*, 68 Hun, 450, 23 N. Y. Supp. 70; *Wynne v. Haight*, 27 App. Div. 7, 50 N. Y. Supp. 187.

⁸⁴ *Hoffman v. Aetna F. Ins. Co.*, 24 Super. Ct. (1 Rob.) 501, 19 Abb. Pr. 325.

⁸⁵ *Ogden v. Raymond*, 18 Super. Ct. (5 Bosw.) 16; *Taft v. Little*, 78 App. Div. 74, 78, 79 N. Y. Supp. 507.

⁸⁶ *Gleason v. Smith*, 34 Hun, 547.

⁸⁷ *Mengis v. Fifth Ave. R. Co.*, 81 Hun, 480, 30 N. Y. Supp. 999; *Reading Braid Co. v. Stewart*, 20 Misc. 86, 45 N. Y. Supp. 69; *DeLafield v. De Grauw*, 22 Super. Ct. (9 Bosw.) 1; *Barnes v. O'Reilly*, 73 Hun, 169, 25 N. Y. Supp. 906; *Sloane v. Lockwood Chem. Co.*, 45 State Rep. 265, 18 N. Y. Supp. 442.

ence, or as to a small part of their contents, the parties, by stipulation, or the court or judge below, may, upon notice, settle a statement respecting the same, or the parts thereof to be returned upon the appeal from the order, to be used in place of the original documents.⁸⁸

If a review of questions of fact is sought, it is necessary that the case contain all the evidence. Thus, if the trial was by the court without a jury, or by a referee, the appellant must see to it that the case contains all the evidence and the certificate so states, if he desires to review the question as to the "sufficiency" of the evidence to support the findings of fact, though the appellate court may consider the question whether there is "any" evidence to support the finding of facts notwithstanding the case does not state that it contains all the evidence,⁸⁹ since, as stated in a previous chapter,⁹⁰ a finding of fact without any evidence tending to support it is a ruling on a question of law to which an exception may be taken.⁹¹ If the case does not state that it contains all the evidence, it must be presumed that the findings of fact are supported by competent and sufficient evidence.⁹² In such a case, the court will assume the truth of the findings of fact and such other facts as may be necessary to uphold the judgment, where not in conflict with the facts found.⁹³ The only question then is

⁸⁸ Rule 34 of General Rules of Practice.

⁸⁹ If any evidence is omitted by the party making up the case, the respondent should cause it to be inserted by amendment. *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Van Bokkelen v. Berdell*, 130 N. Y. 141.

⁹⁰ Volume II, p. 2387.

⁹¹ That this rule applies to jury trials was held in *Robbins v. Downey*, 45 State Rep. 279, 18 N. Y. Supp. 100, which followed *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165, which, however, related merely to appeals from a judgment based on a decision of a judge or a referee's report. There is no question but what the rule does not apply to a verdict.

⁹² *Brown v. Fishel*, 83 Hun, 103, 31 N. Y. Supp. 361; *Button v. Kinnetz*, 88 Hun, 35, 34 N. Y. Supp. 522; *Gregory v. Clark*, 53 App. Div. 74, 65 N. Y. Supp. 687; *Miller v. Farmers' & Merchants' State Bank*, 85 App. Div. 175, 83 N. Y. Supp. 74; *Kissam v. Kissam*, 21 App. Div. 142, 47 N. Y. Supp. 270; *Uhlefeldt v. City of Mt. Vernon*, 76 App. Div. 349, 78 N. Y. Supp. 500; *Fleck v. Rau*, 9 App. Div. 43, 41 N. Y. Supp. 64.

⁹³ *Gardiner v. Schwab*, 110 N. Y. 650; *Davis Sewing Mach. Co. v.*

whether the findings sustain the conclusions of law,⁹⁴ and every legitimate inference which the findings warrant must be drawn to sustain the judgment.⁹⁵ Where all the evidence is not in the case, a judgment will not be reversed merely because a finding of fact is inconsistent with a fact alleged in the complaint and admitted in the answer, since the trial might have been on issues other than those raised by the pleadings.⁹⁶

If the trial was a jury trial and the defeated party desires to urge on appeal that the verdict is against the evidence, or the damages are inadequate or excessive, it is necessary that a motion for a new trial be made and that the case on an appeal from an order denying the motion include all the evidence given on the trial, since failure to have such a certificate embodied in the case precludes the appellate court from reviewing such questions;⁹⁷ though, as stated on page 2664, if a motion for a nonsuit or to direct a verdict has been made and denied, and an exception taken to the ruling, the appellate court may review such ruling though the case does not purport to contain all the evidence. So the omission to certify that the case contains all the evidence precludes the examination of a motion for a new trial on the merits.⁹⁸ It follows that if

Best, 50 Hun, 76, 4 N. Y. Supp. 510; *Bond v. Bond*, 51 Hun, 507, 4 N. Y. Supp. 569.

⁹⁴ *McCabe v. O'Connor*, 4 App. Div. 354, 38 N. Y. Supp. 572; *Norton v. Matthews*, 11 Misc. 711, 31 N. Y. Supp. 1131.

⁹⁵ *Murray v. Marshall*, 94 N. Y. 611.

⁹⁶ *Knickerbocker v. Robinson*, 83 App. Div. 614, 82 N. Y. Supp. 314.

⁹⁷ *Meislahn v. Irving Nat. Bank*, 62 App. Div. 231, 234, 70 N. Y. Supp. 988; *Gibson v. Metropolitan St. R. Co.*, 31 Misc. 391, 64 N. Y. Supp. 396; *Spring v. Chautauqua Mut. Life Ass'n*, 38 State Rep. 968, 14 N. Y. Supp. 904; *Webster v. Kings County Trust Co.*, 80 Hun, 420, 30 N. Y. Supp. 357; *Goodrich v. Gillies*, 62 Hun, 479, 17 N. Y. Supp. 88; *Hunt v. Webber*, 22 App. Div. 631, 48 N. Y. Supp. 24; *Feiber v. Lester*, 36 State Rep. 986, 13 N. Y. Supp. 339; *Jeffers v. Bantley*, 47 Hun, 90; *Revelski v. Drosch*, 6 App. Div. 190, 39 N. Y. Supp. 1008. Compare, however, *Gibson v. Metropolitan St. R. Co.*, 31 Misc. 391, 64 N. Y. Supp. 396, which criticizes *Hunt v. Webber*, 22 App. Div. 631, 48 N. Y. Supp. 24.

⁹⁸ *McAvoy v. Cassidy*, 8 Misc. 595, 29 N. Y. Supp. 321; *Cheney v. New York Cent. & H. R. R. Co.*, 16 Hun. 415; *Boyer v. Brown*, 1 Hun, 615; *La Societa Italiana di Beneficenza v. Sulzer*, 47 State Rep. 292, 19 N. Y. Supp. 824.

a document is referred to in the case made on appeal but is not included in the case, the court will not reverse the judgment for want of evidence.⁹⁹ If an inspection of the premises is additional ocular evidence, what was seen must appear in the case.¹⁰⁰ It should be noticed, however, that where a case contained a fact admitted by both parties or where the evidence included is all one way on a certain question of fact, the court is bound to regard it and is not at liberty to presume that there was evidence to the contrary simply because of the absence of a certificate that all the evidence is contained in the case.¹⁰¹

— **Exceptions.** The case must contain the exceptions taken by the party making the case;¹⁰² and in a case where a special question is submitted to the jury, or the jury have assessed damages, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial in case the judgment should be reversed.¹⁰³ Except as stated, exceptions taken by the prevailing party are not properly part of a case on appeal prepared by the party who has been unsuccessful,¹⁰⁴ unless special reasons exist

⁹⁹ *Sands v. Kimbark*, 27 N. Y. 147.

¹⁰⁰ *Clafin v. Meyer*, 75 N. Y. 260, 267.

¹⁰¹ *Lydecker v. Village of Nyack*, 6 App. Div. 90, 39 N. Y. Supp. 509.

¹⁰² Code Civ. Proc. § 997; *Hunt v. Bloomer*, 13 N. Y. (3 Kern.) 341; *Carey v. Carey*, 4 Daly, 270. Stipulation that an exception shall be deemed to follow every ruling is not sufficient. *Briggs v. Waldron*, 83 N. Y. 582. Exceptions must have been actually taken. *Banker v. Fisher*, 27 State Rep. 953, 7 N. Y. Supp. 732. It is not sufficient that the exceptions are printed in the appeal papers. *Philbin v. Patrick*, 6 Abb. Pr. (N. S.) 284. It is irregular to make an exception by inserting in the case that "defendant excepts to foregoing italicized portion of the charge." An exception must be taken at the trial, and at that time the charge is not in print, and no part of it can be italicized. *Loram v. Third Ave. R. Co.*, 57 Super. Ct. (25 J. & S.) 165, 25 State Rep. 926, 6 N. Y. Supp. 504; judgment affirmed 117 N. Y. 657.

¹⁰³ Code Civ. Proc. § 997.

¹⁰⁴ *Clark v. House*, 40 State Rep. 956, 16 N. Y. Supp. 777; *Beach v. Cooke*, 28 N. Y. 508; *In re Levy's Will*, 91 App. Div. 483, 86 N. Y. Supp. 862.

therefor.¹⁰⁵ If the trial was without a jury, the exceptions taken to the decision of the judge or the report of the referee after the final decision of the cause need not, however, be included in the case since they form a part of the judgment roll.¹⁰⁶

If, after the settlement of the case, it afterwards becomes necessary to separate the exceptions, the separation may be made, and the exceptions may be stated, with so much of the evidence and other proceedings, as is material to the questions raised by them, in a case, prepared and settled, as directed in the general rules of practice; or, in the absence of directions therein, by the court, on motion.¹⁰⁷

— **Judge's charge.** If exceptions have been taken to the charge, but not otherwise,¹⁰⁸ the charge should be inserted in the case. So if a request to charge has been refused and an exception taken, the request should be included in the case.¹⁰⁹ But where a refusal to charge is complained of, it is necessary to include not only the request to charge but also all of the charge as given, since, in the absence of all the instructions, the reviewing court will presume that correct instructions were given.¹¹⁰

— **Remarks of counsel.** Remarks of counsel claimed to be improper, if excepted to,¹¹¹ may be included in the case,¹¹²

¹⁰⁵ *Dabney v. Stevens*, 10 Abb. Pr. (N. S.) 43, 40 How. Pr. 341, 32 Super. Ct. (2 Sweeny) 415.

¹⁰⁶ Code Civ. Proc. § 994; *Pettit v. Pettit*, 20 Wkly. Dig. 154. If, however, the successful party seeks to strike out of the case the exceptions on the ground that they were not duly filed, the burden is on him to show such fact. *Young v. Young*, 133 N. Y. 626.

¹⁰⁷ Code Civ. Proc. § 997.

¹⁰⁸ *Shook v. O'Neill*, 1 Month. Law Bul. 38.

¹⁰⁹ The request should not be excluded on the ground that the matters covered by it were substantially embraced in other requests which were charged. *New York Rubber Co. v. Rothery*, 112 N. Y. 592.

¹¹⁰ *Marine Bank v. Clements*, 19 Super. Ct. (6 Bosw.) 166; *Flannery v. Van Tassell*, 32 State Rep. 350, 9 N. Y. Supp. 871.

¹¹¹ *Klein v. Second Ave. R. Co.*, 53 Super. Ct. (21 J. & S.) 531.

¹¹² *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Kley v. Healy*, 127 N. Y. 555.

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with a complete history of the incident where necessary to show the connection.¹¹³

— **Affidavits.** Affidavits used on a motion to postpone should be incorporated if appellant so desires and has taken an exception to the refusal of the motion.¹¹⁴

— **Copy of account.** Inasmuch as a copy of an account served in pursuance of a demand therefor is not a part of the complaint and is therefore not a part of the record, it is necessary to put it in the case where a review thereof is desired.¹¹⁵

— **Form of case.**

[Title of court and venue.]

[Title of action.]

The issues joined in the above-entitled action came on for trial at a ——— term of the ——— court, held in and for the county of ———, at ———, in the city of ———, commencing on the ——— day of ———, 190—, before Hon. ——— [and a jury].

———, Esq., appearing on behalf of the plaintiff and ———, Esq., appearing for the defendant.

The following proceedings were thereupon had: [Here state, in chronological order, the proceedings on the trial. If the sufficiency of the evidence is to be reviewed, after a jury trial, insert all the evidence and then have the case certified by the judge or referee to the effect that it contains all the evidence given on the trial.^{115a} State the evidence in narrative form or else have certificate to case state, in ef-

¹¹³ Tisdale v. Delaware & H. Canal Co., 116 N. Y. 416.

¹¹⁴ Gallaudet v. Steinmetz, 45 Super. Ct. (13 J. & S.) 239.

¹¹⁵ Spies v. Michelsen, 15 Misc. 414, 36 N. Y. Supp. 619.

^{115a} It is not sufficient to stipulate as follows: It is hereby stipulated, by and between the attorneys for the respective parties hereto, that the foregoing case [and exceptions] contains all the evidence given and proceedings had on the trial of this action, and that an order may be made and entered in the ——— county clerk's office, without notice, settling the case, and ordering it filed in said clerk's office, the same to form a part of the record on appeal herein to ———, pursuant to section 3301 of the Code of Civil Procedure." Code Civ. Proc. § 3301, provides that where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by the

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fect, that "it is hereby determined that a proper presentation of the case requires so much of the evidence to be stated in *haec verba* as is so stated therein." If it is desired to include exhibits in full, have said certificate so state. If exceptions taken on the trial are included, fully state ground of objection.]

The foregoing case and exceptions [containing all the evidence herein on the trial of this action], is hereby settled and ordered filed and annexed to the judgment roll now on file in the ——— county clerk's office.^{115b}

[Date.]

[Signature of referee or judge. Initials of judge's title.]

§ 1913. Settlement.

If the party served with a case does not, within ten days thereafter, serve a copy of proposed amendments, he is deemed to have agreed to the case as proposed.¹¹⁶ If proposed amendments have been duly served on the party proposing the case or exceptions, he may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a place and a time to be specified in the notice, which time must be not less than four nor more than ten days thereafter, to the judge or referee before whom the cause was tried.¹¹⁷ The judge or referee shall thereupon correct and settle the case.¹¹⁸ A stipulation by the parties waiving a settlement and signature by the judge or referee is ineffectual since a case on appeal must be settled and signed by the judge or referee.¹¹⁹ Cases reserved for argument and special verdicts are settled in the same manner.¹²⁰

Code, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same.

^{115b} A clause may be added which permits a copy of the printed case to be filed in lieu of the original case.

¹¹⁶ Rule 33 of General Rules of Practice.

^{117, 118} Rule 32 of General Rules of Practice.

¹¹⁹ *Watson v. Duncan*, 29 Misc. 447, 60 N. Y. Supp. 755.

¹²⁰ Rule 32 of General Rules of Practice.

Settlement.

— Form of notice of settlement of case.

[Title of action.]

Please take notice that the proposed case in this action, with the proposed amendments, will be submitted to his Honor, ———, before whom the action was tried, at ——— for settlement, at ——— o'clock, in the ——— noon of the ——— day of ———, 190—.

[Date.]

[Signature and office address of attorney.]

[Address to opposing attorney.]

— **Who may settle.** The case must be settled and signed by the judge, justice, or the referee, by or before whom the action was tried or, in the case of the death or disability of the judge, justice, or referee, in such manner as the court directs.¹²¹ So the presiding judge may be compelled to settle a case though in the meantime his term of office has expired or for other reasons he is no longer a member of the court.¹²² Where the reference is to more than one referee, a majority may settle the case.¹²³

— **Powers and duties of judge or referee.** The settlement of the case rests, to a large extent, in the discretion of the judge or referee presiding at the trial,¹²⁴ who has authority to correct a case even as to matters concerning which the parties agree.¹²⁵ If there is a dispute as to the facts, the judge or referee may hear and consider the affidavits of the parties and their counsel, inspect their notes as well as his own, and consult his own recollection as well as other accessible means of information, but if he is asked to place on record a statement of facts which are at variance with his own memory of what happened, he cannot be compelled to do so.¹²⁶ He may

¹²¹ Code Civ. Proc. § 997.¹²² Code Civ. Proc. § 25. The fact that the trial judge's term of office has expired does not excuse failure to move before him for a settlement. *Harris v. Morange*, 1 City Ct. R. 221.¹²³ Code Civ. Proc. § 1026.¹²⁴ *Canzi v. Conner*, 43 Super. Ct. (11 J. & S.) 569, 4 Abb. N. C. 148.¹²⁵ *McManus v. Western Assur. Co.*, 40 App. Div. 86, 57 N. Y. Supp. 559.¹²⁶ *Grossman v. Supreme Lodge, K. & L. of H.*, 16 Civ. Proc. R. (Browne) 215; *Tweed v. Davis*, 1 Hun, 252; *Ditmas v. McKane*, 87 App. Div. 54, 83 N. Y. Supp. 1077.

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refuse to settle the case until the stenographer's minutes are submitted to him.¹²⁷ If any dispute arises as to evidence, the minutes of the official stenographer must control,¹²⁸ though it is no answer to a motion to correct a case by inserting matters alleged to have taken place on the trial that they do not appear in the stenographer's minutes, where the parties agree on the facts.¹²⁹ And the mere fact that matter appears in the stenographer's minutes does not authorize its insertion in the case irrespective of whether it occurred during the trial or afterwards.¹³⁰ On the other hand, the judge or referee may strike out an exception not appearing on his minutes nor in the stenographer's notes, although counsel makes an affidavit that it was taken at the trial.¹³¹

Unless so ordered by the judge or referee settling the case, it should not contain the evidence in *haec verba*, or by question and answer, but the facts of the case, together with the rulings on the trial, should be stated in a narrative form, except that where it is claimed by either party that any particular testimony should be given in *haec verba*, the judge or referee who settles the case must determine whether a proper presentation of the case for review requires such portion of the evidence to be so stated in *haec verba*, whereupon the case shall be made accordingly.¹³² This rule should be observed

¹²⁷ *Kammermann v. Eisner & Mendelson Co.*, 25 Misc. 405, 55 N. Y. Supp. 438.

¹²⁸ *Nelson v. New York & N. H. R. Co.*, 1 Month. Law Bul. 15.

¹²⁹ *Foster v. Standard Nat. Bank*, 21 Misc. 8, 46 N. Y. Supp. 839.

¹³⁰ *Wierichs v. Innis*, 32 Misc. 462, 66 N. Y. Supp. 553.

¹³¹ *Canzi v. Conner*, 43 Super. Ct. (11 J. & S.) 569, 4 Abb. N. C. 148.

¹³² Rule 34 of General Rules of Practice; *Bissel v. Hamlin*, 30 N. Y. 519; *Hubbard v. Chapman*, 28 App. Div. 577, 51 N. Y. Supp. 207. Using the stenographic notes in toto is not commendable. *Wierichs v. Innis*, 32 Misc. 462, 66 N. Y. Supp. 553; *Howland v. Woodruff*, 60 N. Y. 73. On making up the case where a stipulation had been entered enabling the party to read from the printed record of a former appeal, it is proper to so settle the case as to give the evidence adduced on the trial the same force and effect that it had on a former trial, so that the testimony read from such former record should be printed, not in the order in which it was technically read, but in the order in which it was presented and considered by the referee in the printed copy submitted to

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notwithstanding that the expense needlessly incurred may fall on the appellant.¹³³ The court will not ordinarily settle a case unless the evidence has been reduced to narrative and all verbiage and immaterial matters are eliminated.¹³⁴ But a party is entitled to have a colloquy on the trial set forth in a case on appeal in full instead of the court's conclusions therefrom as to what was admitted by counsel for one of the parties.¹³⁵ Exhibits should not be printed at length unless the judge or referee so directs.¹³⁶

It is the duty of the judge to strike out all the evidence and other matters unnecessarily inserted.¹³⁷ But the judge cannot arbitrarily strike out evidence regarded by appellant as material to his appeal.¹³⁸ The parties may agree on the facts proven to be inserted in the case, instead of the testimony, on the approval of the judge.¹³⁹ An amendment of a proposed case by striking out testimony will not be regarded as an abuse of discretion, unless the papers submitted on an appeal from the ruling show that the party objecting was prejudiced in a material way.¹⁴⁰

Matters not in the proposed case, nor in the proposed amendments, may be incorporated in the case on the judge's or referee's own motion. Thus, the judge may properly require a statement of facts in his opinion to be printed in order that the appellate court may be informed of the view of the facts on which he based his legal conclusions.¹⁴¹ So he has

him for his final consideration. *Griggs v. Day*, 26 Civ. Proc. R. (Scott) 190, 45 N. Y. Supp. 309.

¹³³ *Smith v. Newell*, 32 Hun, 501.

¹³⁴ *Donai v. Lutjens*, 20 Misc. 221, 45 N. Y. Supp. 364.

¹³⁵ *Cooley v. Trustees of New York & Brooklyn Bridge*, 36 App. Div. 520, 55 N. Y. Supp. 832.

¹³⁶ Rule 34 of General Rules of Practice.

¹³⁷ Rule 34 of General Rules of Practice; *Wierichs v. Innis*, 32 Misc. 462, 66 N. Y. Supp. 553; *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247.

¹³⁸ *Healey v. Terry*, 26 State Rep. 929, 7 N. Y. Supp. 321.

¹³⁹ Rule 32 of General Rules of Practice.

¹⁴⁰ *Levey v. Dennett*, 25 Misc. 768, 55 N. Y. Supp. 612.

¹⁴¹ *McManus v. Western Assur. Co.*, 40 App. Div. 86, 57 N. Y. Supp. 559.

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the right to see that his charge is correctly inserted in the case and the parties cannot prevent this by agreement.¹⁴² The judge may insert such facts which transpired on the trial as he conceives necessary to render his charge intelligible, although not insisted on by either party, and may also insert opinions expressed by him in the hearing of the jury, though not embodied in the formal charge.¹⁴³ But he has no power to permit the insertion of exceptions to rulings made at the trial which were not taken at the time the rulings were made,¹⁴⁴ nor to change the case so as to cause it to state untruly the events of the trial,¹⁴⁵ nor to insert exceptions not actually taken.¹⁴⁶

— **Effect of failure to notice case for settlement after service of amendments.** If the adverse party serves amendments to the proposed case and exceptions, and the appellant fails to serve a notice of the settlement thereof, then the amendments are all allowed,¹⁴⁷ and the case thereupon becomes settled so that the duty rests upon the appellant to procure, within ten days thereafter, the case to be signed by the judge or referee and filed, and the failure so to do operates as an abandonment of the case and exceptions.¹⁴⁸ If the appellant desires to be relieved from the position in which he is placed, so as to get his case and exceptions resettled, signed, and filed, and make them a part of the papers on appeal, he must move to open the defaults with reference thereto, and such motion must be made at special term.¹⁴⁹ If he desires to

¹⁴² Root v. King, 6 Cow. 569.

¹⁴³ Walsworth v. Wood, 7 Wend. 483.

¹⁴⁴ Fifth Ave. Bank v. Webber, 27 Abb. N. C. 1, 15 N. Y. Supp. 734.

¹⁴⁵ Carter v. Beckwith, 82 N. Y. 83; Kamermann v. Eisner & Mendelson Co., 25 Misc. 405, 55 N. Y. Supp. 438.

¹⁴⁶ Westcott v. Thompson, 16 N. Y. 613.

¹⁴⁷ Rule 33 of General Rules of Practice.

¹⁴⁸ Rule 35 of General Rules of Practice; Rothschild v. Rio Grande W. R. Co., 9 App. Div. 407, 41 N. Y. Supp. 293; Vandenberg v. Mathews, 52 App. Div. 616, 7 Ann. Cas. 484, 65 N. Y. Supp. 365.

¹⁴⁹ Vandenberg v. Mathews, 52 App. Div. 616, 65 N. Y. Supp. 365; Rothschild v. Rio Grande W. R. Co., 9 App. Div. 407, 41 N. Y. Supp. 293.

have an actual settlement of the case before a judge or referee, he must move to be relieved from the effect of his failure to serve a notice of settlement, and then after such settlement is had, he must procure the case and exceptions to be signed and filed within ten days.¹⁵⁰ If he chooses to regard the case and exceptions as already settled, and to have them signed by the referee and filed, he can do neither of these things until he has procured an order opening his default.¹⁵¹ The order opening the default usually imposes costs.

§ 1914. Signature and filing.

The Code provides that if the appeal is from a judgment, the printed case and exceptions must be ordered filed by the justice or referee before whom the case was tried.¹⁵² The General Rules of Practice provide that when a party makes a case, or a case and exceptions, he shall procure the same to be signed by the judge or referee, and filed within ten days after it shall have been settled, or it shall be deemed abandoned, unless the time is extended by order.¹⁵³ Where a party fails to have his case signed and filed within ten days after it has been settled, his proper course is to move to have his default opened after which, if his application is granted, he may have his case regularly filed.¹⁵⁴ Such a motion must be made at special term.¹⁵⁵ A default in filing a case should ordinarily be opened in all cases where good faith appears unless the respondent can show some delay or inconvenience.¹⁵⁶ But

¹⁵⁰ *Vandenbergh v. Mathews*, 52 App. Div. 616, 65 N. Y. Supp. 365.

¹⁵¹ *Vandenbergh v. Mathews*, 52 App. Div. 616, 65 N. Y. Supp. 365; *Rothschild v. Rio Grande W. R. Co.*, 9 App. Div. 407, 41 N. Y. Supp. 293.

¹⁵² Code Civ. Proc. § 1353.

¹⁵³ Rule 35 of General Rules of Practice; *Rothschild v. Rio Grande W. R. Co.*, 9 App. Div. 406, 41 N. Y. Supp. 293.

¹⁵⁴ *Carr v. Butler*, 32 Misc. 657, 67 N. Y. Supp. 491; *Rothschild v. Rio Grande W. R. Co.*, 9 App. Div. 406, 41 N. Y. Supp. 293.

¹⁵⁵ *Vandenbergh v. Mathews*, 52 App. Div. 616, 65 N. Y. Supp. 365; *Rothschild v. Rio Grande W. R. Co.*, 9 App. Div. 407, 41 N. Y. Supp. 293.

¹⁵⁶ *Waterman v. Whitney*, 7 How. Pr. 407.

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not only must good grounds for the delay be shown but also grounds for not having secured an extension of time.¹⁵⁷ If the time in which a party is required to file a case, after its settlement and signature, is not enlarged, the case is abandoned if it is not filed in time, and the party may proceed as if no case or exceptions had been made; a party cannot be compelled to file his case and exceptions after he has served notice of their abandonment.^{158, 159} If the appeal is from a judgment after a jury trial, it would seem that, if the default is not opened, there can be no review. Where the appellant prints and files a case which is not the case as settled, the special term may order such printed case off the files and that his case and exceptions be deemed abandoned.¹⁶⁰

§ 1915. Certification.

After the case is settled, the judge or referee certifies it and orders it to be filed.¹⁶¹ The case must show that it was settled and signed by the judge or referee.¹⁶² It is not sufficient to state, in the appeal book, the evidence taken on the trial where such evidence has not been settled and signed.^{163, 164} Unless so certified and ordered to be filed an appeal will not be heard on the case,¹⁶⁵ though the appeal will not be dismissed.¹⁶⁶ A stipulation by the attorneys will not take the place of a certificate,¹⁶⁷ and the certificate cannot be waived by agreement.

¹⁵⁷ *Gamble v. Lennon*, 9 App. Div. 407, 41 N. Y. Supp. 277.

^{158, 159} *Noonan v. New York, L. E. & W. R. Co.*, 63 Hun. 600, 18 N. Y. Supp. 374.

¹⁶⁰ *Tyng v. Marsh*, 42 Super. Ct. (10 J. & S.) 235.

¹⁶¹ Code Civ. Proc. § 1253. Case must be ordered filed though appeal is from an order. *Odendall v. Haebler*, 91 App. Div. 372, 86 N. Y. Supp. 599.

¹⁶² *Green v. Roworth*, 4 Misc. 141, 23 N. Y. Supp. 777; *Woodhull v. New York City*, 69 Hun. 210, 23 N. Y. Supp. 553; *Williams v. Lindblom*, 87 Hun. 303, 34 N. Y. Supp. 1151.

^{163, 164} *Schoonmaker v. Hilliard*, 55 App. Div. 140, 67 N. Y. Supp. 160.

¹⁶⁵ *Schoonmaker v. Hilliard*, 55 App. Div. 140, 67 N. Y. Supp. 160; *Guyon v. Rooney*, 17 Civ. Proc. R. (Browne) 172; *Matter of Bailey*, 85 N. Y. 629.

¹⁶⁶ *Brush v. Blot*, 11 App. Div. 626, 42 N. Y. Supp. 761.

¹⁶⁷ *Miller v. Farmers & M. State Bank*, 85 App. Div. 175, 83 N. Y. Supp. 74; *Gregory v. Clark*, 53 App. Div. 74, 65 N. Y. Supp. 687.

Certification.

Thus, a stipulation that "the certification of the above case and exceptions is hereby waived and it is consented that the same be filed" does not cure a defect in failing to show that the case was ever settled or ordered to be filed.^{158, 159} The want of a certificate cannot, however, be urged in the court of appeals where no objection was raised in the appellate division.¹⁵⁹ If the case is embraced in the return of the clerk, the supreme court will presume that it has been properly attached and filed with the other papers constituting the judgment roll, even though the certificate of the court does not show affirmatively that it has been attached and filed.¹⁶¹

— **Certificate that case contains all the evidence.** It has been held in a number of cases, principally in the first department, that the certificate is not sufficient where it recites that it contains all the "testimony" taken on the trial,¹⁶² though such holdings have been questioned in the second department,¹⁶³ and in the court of appeals.¹⁶⁴ So a certificate that the case contains all the "oral evidence" given on the trial is insufficient.¹⁶⁵ But a certificate that the case contains "all the testimony given, all the exhibits of the parties, and all the proceedings had upon the trial" is equivalent to certifying that it contains all the evidence.¹⁶⁶ So a certificate that the case contains all the evidence "relating to the matters contained in said case and bill of exceptions,"¹⁶⁷ or all the evi-

¹⁵⁸ *See* *Bonsford v. De Rusey*, 73 Hun. 377, 29 N. Y. Supp. 192.

¹⁵⁹ *Reese v. Boas*, 92 N. Y. 682.

¹⁶⁰ *Dixon v. Buck*, 42 Barb. 78.

¹⁶¹ *Cutler v. Pooler*, 47 Stain. Rep. 26, 49 N. Y. Supp. 428; *Kochler v. Hughes*, 73 Hun. 167, 29 N. Y. Supp. 1901; *Randall v. New York El. R. Co.*, 73 Hun. 127, 27 N. Y. Supp. 1992; *Greening v. Malcolm*, 83 Hun. 9, 31 N. Y. Supp. 612; *Becker v. Elmer*, 12 App. Div. 555, 43 N. Y. Supp. 687.

¹⁶² *Zimmerman v. United R. Co.*, 2 App. Div. 219, 38 N. Y. Supp. 362; *Haffenbeck v. Smith*, 51 App. Div. 844, 64 N. Y. Supp. 357.

¹⁶³ *Fuller v. Horack*, 145 N. Y. 549; where objection was held waived where not urged in the appellate division.

¹⁶⁴ *Malachuk v. Lindberg*, 2 App. Div. 146, 37 N. Y. Supp. 854.

¹⁶⁵ *Orson v. Richmond*, 42 App. Div. 218, 39 N. Y. Supp. 1608.

¹⁶⁶ *Oskendib v. Balz*, 19 App. Div. 244, 46 N. Y. Supp. 262.

Certification

dence "bearing on the exceptions given on the trial,"¹⁷⁸ or all the evidence that bears on the issues to be raised,¹⁷⁹ is sufficient. An affidavit of appellant's attorney annexed to the case does not supply the place of the certificate that the case contains all the evidence.¹⁸⁰ The statement that all the evidence is incorporated must be in the certificate and not in the preliminary statement prefixed to the case, showing the time of beginning the action, etc.¹⁸¹ If respondent fails to call the attention of the judge to material testimony that has been omitted, the appellant is entitled as of strict right to a certificate that the case contains all the evidence.¹⁸² Of course, a certificate that the case contains all the evidence does not mean that it in fact contains every word of evidence given on the trial but that it contains all the material evidence.¹⁸³

— **Conclusiveness of certificate.** The certificate of the trial judge as to the correctness of the case is conclusive on appeal;¹⁸⁴ and a motion may be founded on the case,¹⁸⁵ though the case is not conclusive as to third persons.¹⁸⁶ So a certificate that the case contains all the evidence is conclusive thereof.¹⁸⁷ A statement in the case as to grounds on which the motion was made and granted is controlling, and the clerk's minutes, though incorporated in the record, cannot be referred to to show that the motion was also based on other grounds than those stated in the case.¹⁸⁸ But a statement in a judgment that the action was referred by the court is conclusive though the case states that the referee was ap-

¹⁷⁸ *McEntyre v. Tucker*, 5 Misc. 228, 25 N. Y. Supp. 95.

¹⁷⁹ *Clark v. House*, 40 State Rep. 956, 16 N. Y. Supp. 777.

¹⁸⁰ *Gorham Mfg. Co. v. Seale*, 3 App. Div. 515, 38 N. Y. Supp. 307.

¹⁸¹ *Fred Oppermann, Jr., Brew. Co. v. Pearson*, 67 App. Div. 98, 73 N. Y. Supp. 541.

¹⁸², ¹⁸³ *Renwick v. New York El. R. Co.*, 59 Super. Ct. (27 J. & S.) 96, 13 N. Y. Supp. 600.

¹⁸⁴ *Balz v. Shaw*, 11 Misc. 444, 32 N. Y. Supp. 220; *Robertson v. Hay*, 12 Misc. 7, 33 N. Y. Supp. 31.

¹⁸⁵ *Van Bergen v. Ackles*, 21 How. Pr. 314.

¹⁸⁶ *Neilson v. Columbian Ins. Co.*, 1 Johns. 301.

¹⁸⁷ *Barry v. Coville*, 36 State Rep. 598, 13 N. Y. Supp. 4.

¹⁸⁸ *Scott v. Morgan*, 94 N. Y. 508.

RESSETTLEMENT.

pointed by consent of the parties,¹⁸⁰ though if the findings contained in the case as settled by the referee differ from those contained in his report, the former will be deemed correct.¹⁸⁰

§ 1916. Resettlement.

If the case is incomplete or incorrect, a motion should be made on affidavits at special term for a resettlement.¹⁸¹ The motion should be made at special term notwithstanding the case is pending in an appellate court.¹⁸² If the case is pending in the court of appeals, the proper practice is to ask that it be sent back to the appellate division¹⁸³ which may remit it to the trial court,¹⁸⁴ though, if no material changes are to be made to the case, it would seem that the record need not be remitted.¹⁸⁵ The court at special term cannot amend a case settled by a referee, nor compel him to settle the case in a particular way, but under proper circumstances it has a right to send it back to such referee for resettlement, which right cannot be exercised by the appellate division.¹⁸⁶

The resettlement may be on the court's own motion or on motion pursuant to leave granted by the appellate tribunal, or on motion before an appeal is pending. Thus, a trial judge has authority to correct a case even after it has been filed pursuant to a stipulation of the attorneys, if the judge asserts that it does not state the occurrences on the trial in accordance

¹⁸⁰ *Merrill v. Green*, 33 N. Y. 270.

¹⁸¹ *Schwinger v. Raymond*, 33 N. Y. 402; *Hartman v. Proudfit*, 19 Supr. Ct. 16 How. 179.

¹⁸² That the remedy by mandamus should not be resorted to in the first instance will be noticed in a subsequent chapter.

¹⁸³ *Willock v. Waine*, 8 How. Pr. 413.

¹⁸⁴ *Jacox v. Cameron*, 46 N. Y. 645, 649; *Binghamton Opera House Co. v. Binghamton*, 46 N. Y. 651, 655.

¹⁸⁵ *Livingston v. Miller*, 7 How. Pr. 219.

¹⁸⁶ *Peterson v. Swan*, 318 N. Y. 662. See, also, *Willock v. Waine*, 8 How. Pr. 413.

¹⁸⁷ *Ross v. Lammell*, 25 App. Div. 875, 34 N. Y. Supp. 827. But see *Cheever v. Brown*, 17 Civ. Proc. R. (Brown) 24, 7 N. Y. Supp. 818, and *Jaeger v. Koenig*, 28 Misc. 414, 59 N. Y. Supp. 182 which hold that special term has no such power.

Resettlement.

with the facts.¹⁹⁷ But if the appellate division remits the case for resettlement, which it may do,¹⁹⁸ it cannot dictate to the trial judge or referee as to how the case shall be resettled,¹⁹⁹ nor require the trial judge to act in any way contrary to his own recollection of what actually occurred on the trial,²⁰⁰ though the judge cannot decline to resettle a case merely because the matters claimed to have occurred on the trial do not appear in the stenographer's minutes, though he can say that the facts alleged and sought to be inserted in the case did not occur, in which case his certificate is conclusive in so far as to the right to a resettlement is concerned.²⁰¹ Time may be granted appellants to correct the record so as to show that the case has been settled and signed by the court.²⁰² If the case is not signed by the judge nor ordered to be annexed to the roll, it must be sent back for resettlement.²⁰³ So where the case on appeal is so imperfect that the question which is supposed to have arisen cannot be properly examined, it will be sent back for correction.²⁰⁴ And if a case or bill of exceptions sets forth the evidence without condensation, the reviewing court may order the same back for resettlement.²⁰⁵

The refusal of the judge to allow counsel to be heard in relation to settling the case is ground for granting a resettlement.

¹⁹⁷ *McManus v. Western Assur. Co.*, 40 App. Div. 86, 57 N. Y. Supp. 559.

¹⁹⁸ *McCready v. Lindenborn*, 24 Misc. 606, 54 N. Y. Supp. 46; *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247; *Rice v. Isham*, 1 Keyes, 44. See, also, *People v. Ash*, 44 App. Div. 6, 60 N. Y. Supp. 436; *Witherbee v. Taft*, 47 App. Div. 627, 62 N. Y. Supp. 242.

¹⁹⁹ *Renwick v. New York El. R. Co.*, 59 Super. Ct. (27 J. & S.) 96, 13 N. Y. Supp. 600.

²⁰⁰ *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247.

²⁰¹ *Foster v. Standard Nat. Bank*, 21 Misc. 8, 46 N. Y. Supp. 839.

²⁰² *Brush v. Blot*, 11 App. Div. 626, 42 N. Y. Supp. 761.

²⁰³ *McNish v. Bowers*, 30 Hun, 214.

²⁰⁴ *Matter of Strasburger*, 27 State Rep. 509, 7 N. Y. Supp. 547.

²⁰⁵ Rule 34 of General Rules of Practice; *Shaw v. Bryant*, 65 Hun. 57, 19 N. Y. Supp. 618.

Resettlement.

ment,²⁰⁹ as is a stenographer's omission to note an exception;²⁰⁷ but a resettlement should not be allowed merely to insert evidence of a conceded or immaterial fact,²⁰⁸ nor to insert an exception to the admission or rejection of evidence unless it appears that an objection was taken.²⁰⁹ A motion for a resettlement should be granted to have a qualification of an objection inserted as it occurred after the ruling and exception, where there is no dispute about the facts and nothing in the order to show that the recollection of the trial judge in any manner differs from the official stenographer's record.²¹⁰ On resettlement, the appellant is entitled only to have the exceptions noted in the exact place in the record at which they were taken.²¹¹ A case when settled ceases to be the property of the litigants and becomes a judicial record so that neither party has a right to change it and where the requirement "here insert same" (referring to exhibits) is omitted and in lieu thereof it is stated that the exhibit could not be obtained, the case may be made to conform to the facts.²¹²

It has been decided that the appellate division has power, even after the decision of an appeal, to permit the case to be corrected in furtherance of justice,²¹³ though it is generally held that no power exists to allow the amendment after final determination or disposition of the case by the appellate court,²¹⁴ especially where the matters sought to be inserted by amendment were not before an intermediate court.²¹⁵

²⁰⁶ *Root v. King*, 6 Cow. 569.

²⁰⁷ *Toner v. City of New York*, 1 Abb. N. C. 302.

²⁰⁸ *Levey v. Dennett*, 25 Misc. 307, 54 N. Y. Supp. 584; *Green v. Shute*, 15 Daly, 361, 7 N. Y. Supp. 646.

²⁰⁹ *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247.

²¹⁰ *Csatlos v. Metropolitan St. R. Co.*, 63 App. Div. 271, 71 N. Y. Supp. 254.

²¹¹ *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247.

²¹² *McCready v. Lindenborn*, 24 Misc. 606, 54 N. Y. Supp. 46.

²¹³ *Hix v. Edison Elec. Light Co.*, 12 App. Div. 627, 42 N. Y. Supp. 769; *O'Gorman v. Kamak*, 5 Daly, 517.

²¹⁴ *Drake v. New York Iron Mine*, 38 App. Div. 71, 55 N. Y. Supp.

Resettlement.

Formal or clerical errors will be amended in the appellate court.²¹⁶ Thus, an amendment of the case on appeal by inserting a statement that the case contains all the evidence, is properly granted by the appellate court where the respondent concedes that the case does contain all the evidence.²¹⁷ But the appellate division has no jurisdiction of a motion to have disallowed certain amendments to a proposed case which had been allowed by the referee before whom the case was tried.²¹⁸

An order at special term directing defendant to make corrections in a case should not restrain him from moving the same for argument or arguing the same on appeal until the case is corrected.²¹⁹

If the motion is denied, it cannot regularly be renewed before another justice.²²⁰ and the decision is conclusive on the appellate tribunal.²²¹ An order "denying" a motion to resettle a proposed case is appealable,²²² but will not be disturbed unless there is a manifest abuse of power.²²³

§ 1917. Effect.

The entry of final judgment, and the subsequent proceedings to collect or otherwise enforce it, are not stayed by the preparation or settlement of a case unless an order for such a stay is procured and served.²²⁴

920; *Kettle v. Turl*, 14 Misc. 637, 35 N. Y. Supp. 1101, 1110; *Catlin v. Cole*, 10 Abb. Pr. 387.

²¹⁵ *Freudenheim v. Raduziner*, 16 Misc. 9, 37 N. Y. Supp. 647.

²¹⁶ *Farmers' Loan & Trust Co. v. Carroll*, 2 N. Y. (2 Comst.) 566; *Lahens v. Fielden*, 15 Abb. Pr. 177; *Barnard v. Gantz*, 69 Hun, 104, 23 N. Y. Supp. 260; *Martin v. Baust*, 23 App. Div. 234, 48 N. Y. Supp. 989.

²¹⁷ *Martin v. Baust*, 23 App. Div. 234, 48 N. Y. Supp. 989.

²¹⁸ *Ross v. Ingersoll*, 35 App. Div. 379, 54 N. Y. Supp. 827.

²¹⁹ *McManus v. Western Assur. Co.*, 40 App. Div. 86, 57 N. Y. Supp. 559.

²²⁰ *Smith v. Coe*, 31 Super. Ct. (1 Sweeny) 385.

²²¹ *Grossman v. Supreme Lodge, K. & L. of H.*, 22 State Rep. 522, 16 Civ. Proc. R. (Browne) 215, 5 N. Y. Supp. 122.

²²² *New York Rubber Co. v. Rothery*, 112 N. Y. 592; *Zimmer v. Metropolitan St. R. Co.*, 28 App. Div. 504, 51 N. Y. Supp. 247; *Csatlos v. Metropolitan St. R. Co.*, 63 App. Div. 271, 71 N. Y. Supp. 254.

²²³ So held where case as settled conformed to notes of stenographer. *Ditmas v. McKane*, 87 App. Div. 54, 83 N. Y. Supp. 1077.

²²⁴ Code Civ. Proc. § 1005; *Savage v. Hicks*, 2 Wend. 246.

PART X.

NEW TRIAL.

CHAPTER	SECTION
I. GENERAL RULES RELATING TO NEW TRIALS.....	1918-1923
II. GROUNDS FOR NEW TRIAL.....	1924-1933
III. PROCEDURE TO OBTAIN NEW TRIAL.....	1934-1961

CHAPTER I.

GENERAL RULES RELATING TO NEW TRIALS.

- Scope of treatment, § 1918.
- Statutes, § 1919.
- Propriety of motion, § 1920.
- Necessity of motion, § 1921.
- Stipulation for new trial, § 1922.
- Motion as stay of proceedings, § 1923.

§ 1918. Scope of treatment.

It has been the intention to include herein merely the general rules relating to the obtaining of a new trial by motion. New trials ordered on reversing a judgment on appeal, which are often confounded with new trials procured by motion, have been eliminated. Statutory new trials in ejectment will be considered in a subsequent chapter.

§ 1919. Statutes.

The Code provisions relating to new trials in general are contained in chapter 10, title 1, art. 3, sections 992-1007.

Propriety of Motion

§ 1920. Propriety of motion.

After a trial by jury, a motion for a new trial may be made on the judge's minutes on any ground set forth in section 999 of the Code, or exceptions may be ordered heard in the appellate division in the first instance (Code, § 1000), or a motion may be made at special term (Code, § 1002). The same rule applies where specific questions of fact in an equity action have been tried by a jury (Code, § 1003) or by a referee (Code, § 1004).

If the trial was by the court without a jury or by a referee and an interlocutory judgment was directed to be entered, a motion may be made on exceptions at the appellate division, provided the motion is made before the commencement of the hearing directed by the interlocutory judgment (Code, § 1001). In other cases where the trial is by the court without a jury, or by a referee to hear and determine all the issues, there is no Code provision for a new trial based on exceptions, and therefore no motion for a new trial can be based thereon, since the Code expressly provides that a ruling on the trial, to which an exception is taken, can be reviewed only on an appeal from the judgment except where it is expressly prescribed by law that a motion for a new trial may be made thereon.¹ A motion for a new trial in such a case, where not based on exceptions, can only be made at special term as provided for by section 1003 of the Code.

Except as already stated there are no special provisions relating to a new trial after a reference to hear and determine. It seems that such a motion may be made only where not based on exceptions. It should be made at special term. The Code provides that a trial by a referee cannot be reviewed by a motion for a new trial founded on an allegation of error in a finding of fact or ruling on the law, except where the report directs an interlocutory judgment to be entered, and further proceedings must be taken before the court, or a judge thereof, or a referee, before final judgment can be entered.² A mo-

¹ Code Civ. Proc. § 996. See, also, *Mallory v. Wood*, 14 How. Pr. 67.

² Code Civ. Proc. § 1002.

Necessity of Motion.

tion for a new trial at special term after the trial of specific questions of fact by a referee is provided for by section 1004 of the Code.

The entry, collection, or other enforcement of a judgment, does not prejudice a subsequent motion for a new trial.³

The taking of an exception, upon a trial by a jury, or the statement thereof in a case, does not prejudice a motion for a new trial, on the ground that the verdict was contrary to evidence; but such a motion may be made before or after the hearing of the exception; or, in the discretion of the court before which the exception is heard, at the time of the hearing.⁴

§ 1921. Necessity of motion.

After a verdict, report, or decision is rendered, it is often advisable to promptly move for a new trial to save questions for review. The Code expressly provides that after the verdict of a jury, an appeal from the judgment can be taken only on "questions of law."⁵ So if no motion is made for a new trial of issues submitted to a jury in an equity case, questions of fact involved therein can not be reviewed on an appeal from the judgment.⁶ In other words, where there is no order entered denying a motion for a new trial, the appellate court cannot consider questions of fact, but is limited to the exceptions taken on the trial,⁷ except in so far as the appellate court will review a ruling on a question of law where no exception has been taken. Hence, where the trial is by a jury, the question of excessiveness⁸ or inadequacy⁹ of damages, or that the

³ Code Civ. Proc. § 1007.

⁴ Code Civ. Proc. § 1006.

⁵ Code Civ. Proc. § 1216, subd. 2; *Ropes v. Arnold*, 81 Hun. 476, 39 N. Y. Supp. 997; *Third Ave. R. Co. v. Ebling*, 100 N. Y. 98. Where an order denying a motion for a new trial is made and entered subsequent to the entry of judgment, it is not an intermediate order so as to be reviewable on an appeal from the judgment. *Hymes v. Van Cleef*, 39 State Rep. 810, 814, 15 N. Y. Supp. 311; *Zeisloft v. George V. Blackburne Co.*, 91 N. Y. Supp. 8.

⁶ *Ward v. Warren*, 15 Hun. 600; *Chapin v. Thompson*, 23 Hun. 12, 15.

⁷ *Gleason v. Denton*, 4 App. Div. 198, 38 N. Y. Supp. 554; *Hatch v. Spooner*, 1 App. Div. 408, 37 N. Y. Supp. 295.

⁸ *Alfaro v. Davidson*, 40 Super. Ct. (S. J. & S.) 87.

verdict is against evidence,¹⁰ can be urged only by a motion for a new trial. So the only way to urge surprise or to utilize newly-discovered evidence is by a motion for a new trial, irrespective of whether the trial was by jury or without a jury.¹¹

§ 1922. Stipulation for new trial.

If a case has been fairly tried, the parties cannot, by stipulation, obtain a new trial though both of the litigants join in the application therefor.¹²

§ 1923. Motion as stay of proceedings.

The entry of final judgment, and the subsequent proceedings to collect or otherwise enforce it, are not stayed by a motion for a new trial, unless an order for such a stay is procured and served.¹³

⁹ *Carpenter v. Beare*, 4 Hun, 509.

¹⁰ *Ehrman v. Rothschild*, 11 Wkly. Dig. 315, 23 Hun, 273; *Bostwick v. Barlow*, 14 Hun, 177.

¹¹ See *Morrison v. New York & N. H. R. Co.*, 32 Barb. 568.

¹² *Nichols v. Sixth Ave. R. Co.*, 23 Super. Ct. (10 Bosw.) 260; *Schlessinger v. Springfield F. & M. Ins. Co.*, 31 State Rep. 169, 58 Super. Ct. (26 J. & S.) 112, 9 N. Y. Supp. 727.

¹³ Code Civ. Proc. § 1005.

CHAPTER II.

GROUNDS FOR NEW TRIAL.

In general, § 1924.

Erroneous rulings on the trial, § 1925.

— Rulings on evidence.

— Error in charge.

Verdict against the weight of evidence, § 1926.

— In actions for a penalty.

— Effect of two or more juries reaching same conclusion.

— Motion for nonsuit or directed verdict as condition precedent.

— Excessive or inadequate damages.

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— Of party.

— Of counsel.

— Of officers.

— Of spectators, at trial.

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— As to evidence.

— As to witnesses.

— Mistake of witness.

— Absence of counsel.

— Motion to adjourn or to withdraw juror.

Defects in pleadings, § 1932.

Failure of court to file decision, § 1933.

§ 1924. In general.

The grounds for a new trial are not strictly defined by statute. And even where the grounds are stated it is questionable whether the Code provision is exclusive. But, as will be pointed out in the chapter relating to the procedure on a motion for a new trial, there are certain grounds for a new trial on motion at special term which are not grounds for a new

trial on a motion at the trial term on the judge's minutes. It should be remembered that ordinarily there is nothing which is ground for a new trial where it appears that substantial justice has been done and that there is no probability that a second trial will produce a substantially different result.¹ The true test is whether justice requires that a new trial be granted.² Thus, the general rule is that a new trial will not be granted merely to permit plaintiff to recover nominal damages,³ except where a judgment is necessary to protect a property interest.⁴ In other words, a new trial should not be granted merely to enable a party to obtain costs. Furthermore, a party cannot obtain a new trial on grounds based on a different theory of the case from the one on which he insisted at the trial.⁵

A new trial will not be granted because of error of the moving party,⁶ nor to decide an issue not raised at the trial.⁷ So a new trial will not be allowed to permit a party to prove that which he treated at the trial as immaterial and irrelevant,⁸ nor to enable a party to take advantage of a statute passed after the trial.⁹

A new trial has been granted because of the exhibition of an injured foot to the jury where tending to arouse their preju-

¹ *Horton v. Hendershot*, 1 Hill, 118; *Hayden v. Palmer*, 7 Hill, 385; *Todd v. Eighmie*, 10 App. Div. 142, 75 State Rep. 1379, 41 N. Y. Supp. 1013.

² *Lavelle v. Corrignio*, 86 Hun, 135, 67 State Rep. 122, 33 N. Y. Supp. 376. Slight and technical errors not ground. *Koster v. Noonan*, 8 Daly, 231.

³ *Devendorf v. Wert*, 42 Barb. 227; *Stephens v. Wider*, 32 N. Y. 351; *Fleming v. Gilbert*, 3 Johns. 528; *Funk v. Evening Post Pub. Co.*, 76 Hun, 497, 59 State Rep. 333, 27 N. Y. Supp. 1089. But see *Smith v. Bingham*, 29 State Rep. 612, 9 N. Y. Supp. 97.

⁴ *Skinner v. Allison*, 54 App. Div. 47, 66 N. Y. Supp. 288.

⁵ *Staring v. Bowen*, 6 Barb. 109; *Gescheidt v. Quirk*, 5 Civ. Proc. R (Browne) 38.

⁶ *Parsons v. Parsons*, 5 Cow. 476.

⁷ *Jackson v. Stephens*, 13 Johns. 495.

⁸ *Northampton Nat. Bank v. Kidder*, 50 Super. Ct. (18 J. & S.) 246.

⁹ *Babcock v. People*, 15 Hun, 347.

dice and inflame their passions against defendants;¹⁰ but new trial has been refused in a personal injury case where plaintiff became prostrated in the court room and was attended by physicians, where there is no evidence that the attack was simulated or voluntary, and the court asked the jury whether there was any of them whose decision would be affected by the occurrence, and none of them responded.¹¹

§ 1925. Erroneous rulings on the trial.

A motion for a new trial, where the trial was a jury trial, whether on the judge's minutes or at special term or in the appellate division, may be based on exceptions taken to rulings made on the trial. This rule also applies where there has been a trial by jury of framed issues or a reference other than of the whole issue.¹² The Code provides, however, that a ruling to which an exception is taken can be reviewed by a motion for a new trial only where there is an express provision authorizing such a review,¹³ and it seems to follow that errors in rulings of the court on a trial without a jury cannot be reviewed by a motion for a new trial except by motion at the appellate division after an interlocutory judgment, as permitted by section 1000 of the Code, since there is no other Code provision authorizing a new trial because thereof. It will be unnecessary, in this connection, to consider, in detail, what rulings are harmless and what are ground of reversal, since such question will be fully considered in connection with appellate procedure, and it is immaterial whether the question arises on a motion for a new trial or on an appeal. It will not be out of place, however, to briefly state that if the ruling alleged as error is one within the discretion of the trial court it is elementary that such ruling will not authorize the

¹⁰ *Butez v. Fonda, J. & G. R. Co.*, 20 Misc. 123, 79 State Rep. 808, 45 N. Y. Supp. 808. See, also, *Rost v. Brooklyn Heights R. Co.*, 10 App. Div. 477, 47 N. Y. Supp. 1063.

¹¹ *McGloin v. Metropolitan St. R. Co.*, 71 App. Div. 72, 75 N. Y. Supp. 593.

¹² Rule 31 of General Rules of Practice.

¹³ Code Civ. Proc. § 996.

granting of a new trial unless the discretion has been clearly abused.¹⁴

A new trial will not be granted because the reason upon which a correct decision was placed is untenable,¹⁵ nor because of the reversal of an authority relied on by the trial judge, if it appears that his decision may have been correct notwithstanding such reversal.¹⁶

If the new trial is asked for on exceptions because of legal error at the trial, the court has no discretion.¹⁷

— **Rulings on evidence.** Error in receiving or in excluding evidence is not always ground for granting a new trial, inasmuch as the general rule is that if it appears that such error could not by any legal possibility have affected the verdict to the injury of the party objecting, the error may be disregarded, and a new trial denied.¹⁸ So if documentary evidence, which is insufficiently authenticated, has been erroneously admitted on the trial, a new trial should not be granted where a properly authenticated copy is produced and filed on the motion for a new trial.¹⁹ So where error in admitting evidence to rebut a defense is set forth as the ground for a new trial, but the evidence given in support of the defense is wholly insufficient, a new trial should not be granted because of the error.²⁰ But an error in the admission of evidence should not be disregarded if it may have turned the scale on the question of credibility of witnesses.²¹ A new trial will not be ordinarily granted because of the admission of inma-

¹⁴ *Rapelye v. Prince*, 4 Hill, 119; *McCready v. Lindenborn*, 37 App. Div. 425, 56 N. Y. Supp. 54; *Obart v. Simmons Soap Co.*, 13 Civ. Proc. R. (Browne) 227, 27 Wkly. Dig. 311, 11 State Rep. 890.

¹⁵ *Stevens v. Corn Exch. Bank*, 5 T. & C. 283, 3 Hun, 147; *Opdyke v. Prouty*, 6 Hun, 242.

¹⁶ *Fleet v. Kalbfleisch*, 43 Hun, 443, 6 State Rep. 755.

¹⁷ *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334; *Henderson v. Henderson*, 2 Abb. N. C. 102.

¹⁸ *Crary v. Sprague*, 12 Wend. 41; *Dart v. Laimbeer*, 107 N. Y. 664; *Rundle v. Allison*, 34 N. Y. 180.

¹⁹ *Markoe v. Aldrich*, 1 Abb. Pr. 55.

²⁰ *Bronson v. Tuthill*, 1 Abb. Dec. 206, 3 Keyes, 32.

²¹ *Battin v. Healey*, 36 How. Pr. 346.

terial evidence on cross-examination,²² but the bringing out on cross-examination of immaterial evidence which might have prejudiced the jury against the witness is ground for a new trial,²³ as is the admission of testimony merely speculative in its character as to the main issue in the case.²⁴ Evidence erroneously admitted is not to be deemed harmless merely because another issue existed in the case which might have been decided in favor of the successful party.²⁵ A new trial will not be granted because of error in excluding evidence,²⁶ or in receiving evidence,²⁷ bearing only on the measure of damages, where the jury finds against any cause of action. A new trial will be granted, however, for error in the reception or rejection of evidence relating to the question of damages in a statutory action for causing the death of a person, where the verdict is very large and borders on excessiveness, though in other cases the error might have been disregarded.²⁸ Error in admitting or rejecting evidence is, however, a ground for a new trial where a verdict either way would not be without evidence to support it.²⁹ A new trial should be granted because of the improper admission of evidence where it appears that the defeated party "may" have been injured by it; it not being enough that he probably was not injured.³⁰

It is specially provided by the Code that errors in rulings on questions of evidence, or in any other ruling, committed on the trial of special (feigned) issues, do not entitle the expecting party to a new trial of the case if the court is of the

²² *Van Buren v. Stokes*, 3 T. & C. 511, 1 Hun, 434.

²³ *Olney v. Blossier*, 12 State Rep. 211.

²⁴ *Duryea v. Vosburgh*, 121 N. Y. 57.

²⁵ *Ayres v. Water Com'rs of Binghamton*, 22 Hun, 297.

²⁶ *Brown v. Hoburger*, 52 Barb. 15.

²⁷ *Yates v. New York Cent. & H. R. R. Co.*, 67 N. Y. 100.

²⁸ *McIlwaine v. Metropolitan St. R. Co.*, 74 App. Div. 496, 77 N. Y. Supp. 426.

²⁹ *Baird v. Daly*, 68 N. Y. 547.

³⁰ *Gillet v. Mead*, 7 Wend. 193; *Sims v. Sims*, 75 N. Y. 466; *Waring v. United States Tel. Co.*, 4 Daly, 233, 44 How. Pr. 69.

opinion that substantial justice does not require that a new trial should be granted.³¹

—**Error in charge.** Whether error in charging the jury, or in refusing to charge, is ground for a new trial, depends on whether such error has influenced the jury in their verdict.³² For instance, a new trial should not be granted where the erroneous part of the charge relates to a branch of the case which the jury had no occasion to consider,³³ nor where the instructions relate to the question of damages and the jury finds that plaintiff is not entitled to recover anything.³⁴ However, an apparent possibility of injury from an erroneous charge requires the granting of a new trial unless the party seeking to take advantage of the verdict conclusively establishes the absence of injury.³⁵ Error in submitting the question of exemplary damages to the jury will not be disregarded although it appears that the verdict was small.³⁶

§ 1926. Verdict against the weight of evidence.

A verdict "against the weight of evidence" is "contrary to the evidence"—as the term is used in the Code.³⁷ A motion to set aside a verdict as contrary to the evidence is not governed by any well defined rules but depends to a great degree upon the peculiar circumstances of each case. It is addressed to the sound discretion of the court, and whether it should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end.³⁸ Of course, this ground applies only to trials by jury.

³¹ Code Civ. Proc. § 1003. See, also, *Browne v. Murdock*, 12 Abb. N. C. 360.

³² *Mansfield v. Wheeler*, 23 Wend. 79; *Ledyard v. Jones*, 7 N. Y. (3 Seld.) 550.

³³ *Hager v. Hager*, 38 Barb. 92.

³⁴ *Marely v. Shults*, 29 N. Y. 346.

³⁵ *Gaylord v. Karst*, 43 State Rep. 531, 17 N. Y. Supp. 720.

³⁶ *Murphy v. Central Park, N. & E. River R. Co.*, 48 Super. Ct. (16 J. & S.) 96.

³⁷ *Krakower v. Davis*, 20 Misc. 350, 45 N. Y. Supp. 780.

³⁸ *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628. Discretion of court.

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The court may set aside a verdict on its own motion where it is manifestly against the weight of evidence.³⁹ If there is conflicting evidence, it is not enough that the court deems the conclusion reached by the jury to be erroneous,⁴⁰ or that the court would have come to a different conclusion,⁴¹ but there must be such a preponderance of evidence as to satisfy the court that there was either an absolute mistake on the part of the jury or that they acted under the influence of bias, prejudice, passion, or corruption.⁴² In other words, the verdict must be so against a striking preponderance of evidence that a common exercise of judgment demands a new trial.⁴³ The court is more limited in its power than where the question is raised on an appeal from a judgment entered upon a decision of a court or the report of a referee. A verdict will not be disturbed merely because the court thinks the evidence not strong,⁴⁴ nor merely because there is a strong preponderance of evidence in favor of the defeated party,⁴⁵ nor merely because the number of witnesses on the side of the defeated party preponderates over the number of witnesses for the successful party.⁴⁶ But a judge may set aside a verdict supported only by the testimony of an interested party where opposed by that of the adverse party and of disinterested witnesses on the ground that it is so against the weight of evidence as to be clearly the result of sympathy, passion, or prejudice.⁴⁷ And the testi-

Oberlle v. Bushwick Ave. R. Co., 6 State Rep. 771; *Young v. Stone*, 77 Hun, 395, 60 State Rep. 419, 28 N. Y. Supp. 881.

³⁹ *Schmidt v. Brown*, 80 Hun, 183, 61 State Rep. 831, 30 N. Y. Supp. 68.

⁴⁰ *Winchell v. Latham*, 6 Cow. 682; *Mackey v. New York Cent. R. Co.*, 27 Barb. 528.

⁴¹ *Franklin Coal Co. v. Hicks*, 46 App. Div. 441, 61 N. Y. Supp. 875.

⁴² *Cohen v. Dupont*, 3 Super. Ct. (1 Sandf.) 260; *McCann v. New York & Q. C. R. Co.*, 73 App. Div. 305, 76 N. Y. Supp. 684.

⁴³ *Gray v. Delaware, L. & W. R. Co.*, 48 Super. Ct. (16 J. & S.) 121; *McIntyre v. Strong*, 48 Super. Ct. (16 J. & S.) 127, 63 How. Pr. 43.

⁴⁴ *Williams v. Vanderbilt*, 29 Barb. 491.

⁴⁵ *Hickinbottom v. Delaware, L. & W. R. Co.*, 15 State Rep. 11.

⁴⁶ *Fitton v. Brooklyn City R. Co.*, 25 State Rep. 948, 5 N. Y. Supp. 641. Verdict may be set aside as procured by perjury. *Serwer v. Serwer*, 71 App. Div. 415, 75 N. Y. Supp. 842.

⁴⁷ *Langlois v. Hayward*, 26 State Rep. 59, 13 N. Y. Supp. 200; *Reynolds v. New York Cent. & H. R. R. Co.*, 20 App. Div. 339, 46 N. Y. Supp. 763.

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mony of plaintiff in a personal injury case is overcome by the evidence of four disinterested witnesses corroborating the motorman and conductor of the car as to the contributory negligence of plaintiff so as to require a new trial where a verdict has been rendered for plaintiff.⁴⁸ A new trial is properly granted on the ground that the verdict is against the weight of evidence where the testimony of the greater number of witnesses is of a character to make their statements more probable than those of the successful party.⁴⁹ The verdict may be set aside as against the weight of evidence though it would have been improper for the court to direct a verdict.⁵⁰ And the court will not refuse to set aside a verdict as against the weight of evidence merely because the jury inspected the locus in quo, where the object of such inspection was merely to enable the jury to better understand the evidence.⁵¹ But a new trial will not be granted because the verdict is not according to the theory of either party,⁵² nor because of the insufficiency of the evidence to prove a fact which at the trial both parties assumed to be proved.⁵³ And it is not allowable to set aside a verdict as against the weight of evidence in aid of a defense not pleaded though proved at the trial.⁵⁴

— **In actions for a penalty.** Prior to the Code, it was quite uniformly held that in actions for a penalty a verdict for defendant would not be set aside merely on the ground that it was against evidence,⁵⁵ and the rule was extended to

⁴⁸ *Bologna v. Metropolitan St. R. Co.*, 31 Misc. 506, 64 N. Y. Supp. 559.

⁴⁹ *Troteky v. Forty-Second St. & G. St. Ferry R. Co.*, 73 Hun, 26, 57 State Rep. 155, 25 N. Y. Supp. 1054.

⁵⁰ *Pierce v. Metropolitan St. R. Co.*, 21 App. Div. 427, 47 N. Y. Supp. 540; *Ludeman v. Third Ave. R. Co.*, 30 App. Div. 520, 52 N. Y. Supp. 310; *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66.

⁵¹ *Peck v. Fonda, J. & G. R. Co.*, 25 State Rep. 95, 6 N. Y. Supp. 379.

⁵² *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400. Followed in *Scheider v. Corby*, 15 Hun, 493.

⁵³ *Patterson v. Westervelt*, 17 Wend. 543; *Beekman v. Bond*, 19 Wend. 444.

⁵⁴ *Van Mater v. Burns*, 76 Hun, 3, 59 State Rep. 610, 27 N. Y. Supp. 624.

⁵⁵ *Lawyer v. Smith*, 1 Denio, 207.

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actions for libel and slander and other actions vindictive in their nature;⁵⁶ but since the present Code, courts will not deny plaintiff a new trial even in a penal action unless it is consistent with the conscience, justice, and equity of the case to do so.⁵⁷

— **Effect of two or more juries reaching same conclusion.** Where two successive verdicts are the same, the second will not ordinarily be disturbed on the ground that it is against the weight of evidence,⁵⁸ though sometimes a second verdict is set aside as against the weight of evidence; but unless the circumstances are extraordinary and the verdict is clearly outrageous, a court is not justified in setting aside a third verdict on the same facts as against the weight of evidence.⁵⁹ Even a third verdict in favor of a plaintiff will be set aside, however, where based merely on the uncorroborated testimony of a party which is contradicted by his former testimony and by all the facts and circumstances of the case.⁶⁰

— **Motion for nonsuit or directed verdict as condition precedent.** It is not a condition precedent to a motion made for a new trial on the ground that the verdict is contrary to the evidence that a motion for a nonsuit or directed verdict should have been made.⁶¹

— **Excessive or inadequate damages.** Whether a new trial should be granted for excessive or inadequate damages rests within the discretion of the trial court in cases where there

⁵⁶ *Jarvis v. Hatheway*, 3 Johns. 180.

⁵⁷ *People v. Glasgow*, 39 App. Div. 94, 52 N. Y. Supp. 24.

⁵⁸ *McCann v. New York & Q. C. R. Co.*, 73 App. Div. 305, 76 N. Y. Supp. 684; *Ludeman v. Third Ave. R. Co.*, 72 App. Div. 26, 76 N. Y. Supp. 128; *Barrett v. New York Cent. & H. R. R. Co.*, 45 App. Div. 225, 61 N. Y. Supp. 9.

⁵⁹ *McCann v. New York & Q. C. R. Co.*, 73 App. Div. 305, 76 N. Y. Supp. 684; *Seely v. Shaffer*, 32 State Rep. 480, 10 N. Y. Supp. 283; *Dorwin v. Westbrook*, 11 App. Div. 394, 76 State Rep. 1123, 42 N. Y. Supp. 1123.

⁶⁰ *Williams v. Delaware, L. & W. R. Co.*, 66 App. Div. 336, 73 N. Y. Supp. 38.

⁶¹ *Mitchell v. Rouse*, 19 App. Div. 561, 46 N. Y. Supp. 523; *Haist v. Bell*, 24 App. Div. 252, 48 N. Y. Supp. 405; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506.

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is no legal measure of damages or where the correctness of the decision of the court cannot be determined by the application of definite and precise rules.⁶² The power to grant a new trial in actions founded on a tort on the ground that damages are excessive should be sparingly exercised,⁶³ and the discretion be confined within the latitude fixed by rules and precedents.⁶⁴ In actions where exemplary damages may be awarded, such as actions for assault and battery, libel, slander, etc., it has been held that the court will not interfere with the verdict, as excessive or inadequate, unless the damages are so outrageous as to strike every one with the enormity and injustice of them so as to induce the court to believe that the jury must have acted from prejudice, partiality, or corruption;⁶⁵ but the later decisions seem to abolish the distinction between such actions and other actions based on a tort.⁶⁶ A new trial should not be granted for insufficiency of damages in an action for slander, where only nominal damages are awarded, where the evidence justifies a verdict for defendant sustaining the justification set up in the answer.⁶⁷ It is not ground for a new trial that plaintiff had offered to accept a sum less than that recovered on the trial.⁶⁸ On a motion to set aside a verdict as excessive, the rule of damages adopted by the court is to be considered.⁶⁹

If a verdict is set aside as excessive and on a second trial it is partially reduced, it will generally not be set aside again as excessive,⁷⁰ but if increased damages are awarded on a second trial, the verdict will ordinarily be set aside a second time.⁷¹

⁶² 14 Enc. Pl. & Pr. 755.

⁶³ *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Blum v. Higgins*, 3 Abb. Pr. 104.

⁶⁴ *Quirk v. Siegel-Cooper Co.*, 26 Misc. 244, 56 N. Y. Supp. 49.

⁶⁵ *Coleman v. Southwick*, 9 Johns. 45, 51; *Fry v. Bennett*, 9 Abb. Pr. 45; *Crane v. Bennett*, 77 App. Div. 102, 112, 79 N. Y. Supp. 66.

⁶⁶ See *People v. Glasgow*, 30 App. Div. 94, 52 N. Y. Supp. 24.

⁶⁷ *Wavle v. Wavle*, 9 Hun, 125.

⁶⁸ *Beebe v. Robert*, 12 Wend. 413.

⁶⁹ *Felts v. Collins*, 67 App. Div. 430, 73 N. Y. Supp. 796.

⁷⁰ *Peck v. New York Cent. & H. R. R. Co.*, 8 Hun, 286.

⁷¹ *Mahar v. Simmons*, 47 Hun, 479.

The court may, in some cases, refuse to set aside a verdict as excessive where plaintiff consents to deduct the amount deemed excessive.⁷² Thus, a new trial will not be granted because the verdict exceeds the amount demanded in the complaint, if plaintiff consents to a reduction of the verdict to the amount demanded in the complaint.⁷³ So if a verdict is excessive because of interest being added, the court may allow the party to remit such interest.⁷⁴

The power to set aside a verdict as inadequate is as comprehensive as the power to set aside a verdict as excessive.⁷⁵ Inadequacy of the damages is ground for granting a new trial on the minutes of the trial judge,⁷⁶ and if a verdict is grossly inadequate, plaintiff is entitled to a new trial on payment of costs unless defendant consents to a material increase in the amount of damages found.⁷⁷ Whenever the court is called upon to set aside a verdict for inadequacy, it should be made to appear that the prevailing party received a verdict for an amount less than any view of the testimony, consistent with the right of such party to a recovery, justifies.⁷⁸ So a verdict for a portion of the amount claimed will be set aside where the plaintiff is entitled to the whole amount if he is entitled to recover anything.⁷⁹ But defendant cannot insist on a new trial on the ground that the damages awarded to plaintiff are inadequate.⁸⁰

⁷² *Sears v. Conover*, 4 Abb. Dec. 179, 33 How. Pr. 324, 3 Keyes, 113. See *Quirk v. Slegel-Cooper Co.*, 43 App. Div. 464, 60 N. Y. Supp. 228.

⁷³ *Dox v. Dey*, 3 Wend. 356, 362. See, also, *Corning v. Corning*, 6 N. Y. (2 Seld.) 97, 104.

⁷⁴ *McLaughlin v. Washington County Mut. Ins. Co.*, 23 Wend. 525.

⁷⁵ *Stuart v. Press Pub. Co.*, 83 App. Div. 467, 473, 82 N. Y. Supp. 401.

⁷⁶ *Lough v. Romaine*, 36 Super. Ct. (4 J. & S.) 332; *McKeever v. Weyer*, 11 Wkly. Dlg. 258.

⁷⁷ *Richards v. Sandford*, 2 E. D. Smith, 349, 12 N. Y. Leg. Obs. 94.

⁷⁸ *Pendleton v. Johnston*, 39 State Rep. 173, 59 Super. Ct. (27 J. & S.) 331, 14 N. Y. Supp. 629.

⁷⁹ *Powers v. Gouraud*, 19 Misc. 268, 78 State Rep. 249, 44 N. Y. Supp. 249; *Morrissey v. Westchester Elec. R. Co.*, 30 App. Div. 424, 51 N. Y. Supp. 945.

⁸⁰ *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. 400; *Lamberty v. Roberts*, 31 State Rep. 148, 9 N. Y. Supp. 607.

Verdict Contrary to Law.

§ 1927. Verdict contrary to law.

The phrase "contrary to law" means that the verdict is one which the law does not authorize the jury to render on the evidence presented to them.⁸¹ A motion for a new trial, on the ground that the verdict is contrary to law, only raises the question whether the verdict is one which the law authorizes the jury to render upon the evidence, and not whether the court's instructions to the jury were erroneous; for although a verdict upon erroneous instructions is contrary to law in the sense that it is not authorized by law, yet it is an error for which the court and not the jury is responsible, and must be pointed out by an exception.⁸² If the jury disregards the charge of the court, the verdict will be set aside as against the law,⁸³ notwithstanding the charge was erroneous.⁸⁴ So a new trial will be granted where a verdict for plaintiff for a sum less than that demanded in the complaint is inconsistent with any finding at all in plaintiff's favor and is in direct contravention of the instructions.⁸⁵

§ 1928. Misconduct.

Misconduct is a well recognized ground for the granting of a new trial. The misconduct may be that of the successful party, of any officer of the court, of the jury, or of spectators at the trial.⁸⁶

— **Of party.** The fact that a party has made remarks out of court in the presence of the jury, reflecting on the character of his adversary, is ground for a new trial irrespective of

⁸¹ *Swartout v. Willingham*, 31 Abb. N. C. 66, 26 N. Y. Supp. 769; *Richardson v. Van Voorhis*, 20 State Rep. 667, 3 N. Y. Supp. 599.

⁸² *Swartout v. Willingham*, 31 Abb. N. C. 66, 6 Misc. 179, 26 N. Y. Supp. 769.

⁸³ *Clark v. Richards*, 3 E. D. Smith, 89; *H. B. Smith Co. v. Chapin*, 38 State Rep. 463, 13 N. Y. Supp. 799.

⁸⁴ *Rogers v. Murray*, 16 Super. Ct. (3 Bosw.) 357.

⁸⁵ *Bigelow v. Garwitz*, 40 State Rep. 580, 15 N. Y. Supp. 940.

⁸⁶ *Meyer v. Fiegel*, 38 How. Pr. 424; *Corley v. New York & H. R. Co.*, 12 App. Div. 409, 411, 42 N. Y. Supp. 941. Permitting the stenographer to enter jury room, without consent of counsel, is ground for a new trial. *Otto v. Young*, 43 Misc. 628, 88 N. Y. Supp. 188.

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whether the jury were influenced thereby.⁸⁷ But a new trial on the ground that fraud was practiced on the court by a party will not be granted unless the fraud is distinctly proved.⁸⁸ In an action for personal injuries, the unnecessary use of crutches in the court room has been held a fraud practiced on the court so as to authorize the granting of a new trial.⁸⁹

Although a verdict will not generally be set aside merely because the jury have been approached, if it clearly appears that no injustice has been done, and the interference did not affect the result; yet if it appears that they have been approached in such a manner as might have influenced their verdict, it should be set aside, without reference to the source or motive of interference.⁹⁰

— **Of counsel.** A new trial has been granted where plaintiff has erred in practice through the erroneous advice of his counsel,⁹¹ though the general rule is that a new trial will not be granted to a party because of the negligence or errors of his counsel where not such as to show fraud or bad faith on the part of the counsel.⁹² But where counsel for the adverse party asks questions which he must be assumed to know are inadmissible, and where the court is satisfied that the verdict of the jury has been influenced thereby, it should set aside the verdict.⁹³

— **Of officers.** The mere presence of an officer in the jury room during their deliberations is not of itself a ground for a new trial.⁹⁴ But the fact that the officer having the jury in charge made estimates calculated to influence the verdict

⁸⁷ *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. 7.

⁸⁸ *Brooks v. Rochester R. Co.*, 10 Misc. 88, 63 State Rep. 508, 31 N. Y. Supp. 179.

⁸⁹ *Corley v. New York & H. R. Co.*, 12 App. Div. 409, 76 State Rep. 941, 42 N. Y. Supp. 941.

⁹⁰ *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. 141.

⁹¹ *Rogers v. Niagara Ins. Co.*, 2 Super. Ct. (2 Hall) 559.

⁹² *Mallach v. Ridley*, 22 Wkly. Dig. 159; *Smith v. Barnes*, 9 Misc. 368, 60 State Rep. 631, 24 Civ. Proc. R. (Scott) 49, 29 N. Y. Supp. 692; *Reynolds v. Reynolds*, 33 App. Div. 625, 53 N. Y. Supp. 135.

⁹³ *Connelmon v. Dunfee*, 172 N. Y. 507.

⁹⁴ *In re Benton*, 16 N. Y. Supp. 111.

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warrants the granting of a new trial though it is not shown that the verdict was in fact influenced.⁹⁵

— **Of spectators at trial.** Disorderly conduct on the part of spectators at a trial, such as applauding the argument of counsel, is a ground for a new trial.⁹⁶

— **Of jury.** Misconduct of members of a jury is not a ground for granting a new trial where it is to be presumed that such misconduct did not injure the moving party.⁹⁷ But where there is misbehavior of the jury, under circumstances affording probability of abuse, to the injury of either party, the court will set aside the verdict.⁹⁸ For instance, the use of intoxicating liquors by members of the jury, after the case has been submitted to them, is ground for setting aside the verdict,⁹⁹ though no prejudice is known to have resulted,¹⁰⁰ though the mere fact that "during the trial" one of the jurors drank liquor is not ground for setting aside the verdict unless there is reason to suppose that he drank to excess or at the expense or invitation of one of the parties.¹⁰¹

The fact that the jury improperly took exhibits to the jury room is not ground for a new trial unless it appears that the verdict may have been influenced thereby;¹⁰² and improper influence is not shown where it appears that the paper taken was not read by the jury.¹⁰³ But a new trial has been granted

⁹⁵ *Thomas v. Chapman*, 45 Barb. 98.

⁹⁶ *Conrad v. Williams*, 6 Hill, 444.

⁹⁷ *Haight v. City of Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *Hardenburgh v. Crary*, 15 How. Pr. 307.

⁹⁸ *Smith v. Thompson*, 1 Cow. 221; *Horton v. Horton*, 2 Cow. 589; *Oliver v. First Presbyterian Church*, 5 Cow. 283; *Wilson v. Abrahams*, 1 Hill, 207.

⁹⁹ *Hanrahan v. Ayres*, 10 Misc. 435, 64 State Rep. 12, 31 N. Y. Supp. 458; *Patrick v. Victor Knitting Mills Co.*, 37 App. Div. 7, 55 N. Y. Supp. 340.

¹⁰⁰ *Brant v. Fowler*, 7 Cow. 562.

¹⁰¹ *Wilson v. Abrahams*, 1 Hill, 207.

¹⁰² *Sanderson v. Bowen*, 4 T. & C. 675, 2 Hun, 153; *Dolan v. Aetna Ins. Co.*, 22 Hun, 396.

¹⁰³ *Hackley v. Hastie*, 3 Johns. 252; *O'Brien v. Merchants' F. Ins. Co.*, 38 Super. Ct. (6 J. & S.) 482; *New York & N. J. Ice Lines v. Howell*, 19 App. Div. 341, 46 N. Y. Supp. 493.

Misconduct of Jury.

where, after the retirement of the jury, some of them, without the consent of the parties, examined the justice's minutes which did not contain all the evidence.¹⁰⁴

It is not sufficient ground for a new trial that a juror has addressed a casual remark to a party during a recess at the trial,¹⁰⁵ nor is a mere attempt of a juror to communicate a verdict to a party before its announcement.¹⁰⁶ But a new trial will be ordered if a juror has improperly conversed with other persons concerning the case.¹⁰⁷ Separation of the jury during the trial, where the parties did not object at the time, is not ground for a new trial;¹⁰⁸ nor is the fact that part of the jury were absent from the jury room for some time before the jury agreed on a verdict;¹⁰⁹ nor is the fact that the jury separated without leave of court after having agreed on a verdict;¹¹⁰ though, of course, if other facts exist showing improper conduct which results in prejudice to the party complaining of it, a new trial must be ordered.¹¹¹ For instance, where a jury procured their separation by pretending that they had sealed a verdict, and then heard a conversation relating to the case, after which they agreed on a verdict, a new trial should be granted.¹¹² A new trial should not be granted because of a premature disclosure of the contents of a sealed verdict.¹¹³ The mere fact that during a view of the premises one of the jurors asked several questions with reference to the case is not ground for a new trial where no prejudice has resulted.¹¹⁴

¹⁰⁴ *Mitchell v. Carter*, 14 Hun, 448.

¹⁰⁵ *Fleischmann v. Samuel*, 18 App. Div. 97, 79 State Rep. 404, 45 N. Y. Supp. 404; *Werner v. Interurban St. Ry. Co.*, 99 App. Div. 592, 91 N. Y. Supp. 111.

¹⁰⁶ *Fash v. Byrnes*, 14 Abb. Pr. 12.

¹⁰⁷ *Sparks v. Wakeley*, 7 Wkly. Dig. 80; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. 141.

¹⁰⁸ *Eastman v. Tuttle*, 1 Cow. 248.

¹⁰⁹ *Smith v. Thompson*, 1 Cow. 221.

¹¹⁰ *Horton v. Horton*, 2 Cow. 589.

¹¹¹ *Anthony v. Smith*, 17 Super. Ct. (4 Bosw.) 503; *Hager v. Hager*, 38 Barb. 92.

¹¹² *Oliver v. First Presbyterian Church*, 5 Cow. 283.

¹¹³ *Shaver v. Beates*, 7 Alb. Law J. 204.

¹¹⁴ *People v. Johnson*, 46 Hun, 667, 13 State Rep. 48, 27 Wkly. Dig. 519.

Misconduct of Jury.

But where two of the jurors, during a recess, took a view of the premises to enable them to better understand the evidence, the misconduct is ground for a new trial, notwithstanding that thereafter the court, without authority, permitted a view by the entire jury.^{114a}

Failure of a juror to disclose his business relations with a party, when asked in regard thereto, is such misconduct as to entitle the defeated party to a new trial.¹¹⁵

The act of a juror which might be ground for a new trial cannot be urged as such where the counsel for the complaining party knew of the facts at the time and did not raise any objection thereto,¹¹⁶ since a party cannot take the chances of a favorable verdict and thereafter object to the act of the juror.¹¹⁷ So a new trial will not be granted because of a remark by a juror to an expert witness, where an application to withdraw the juror was not made until the close of the whole evidence on the following day.¹¹⁸

§ 1929. Disqualification of jurors.

As stated in volume two of this work,¹¹⁹ an objection to the qualifications of a juror is available only on a challenge, and hence if the objection is not taken when the jury is impaneled the presence of the disqualified juror is not ground for a new trial though the disqualification was not known to the defeated party, unless it appears that he was actually prejudiced by it.¹²⁰ There is an exception to this rule, however, in that the Code provides that although the objection that a per-

^{114a} *Buffalo Structural Steel Co. v. Dickinson*, 90 N. Y. Supp. 268.

¹¹⁵ *McGarry v. Buffalo*, 53 State Rep. 882, 24 N. Y. Supp. 16; *Fealy v. Bull*, 11 App. Div. 468, 76 State Rep. 569, 42 N. Y. Supp. 569.

¹¹⁶ *Gale v. New York Cent. & H. R. R. Co.*, 13 Hun, 1; *Werner v. Interurban St. Ry. Co.*, 91 N. Y. Supp. 111.

¹¹⁷ *Paulitsch v. New York Cent. & H. R. R. Co.*, 50 Super. Ct. (18 J & S.) 241; *Ahrhart v. Stark*, 10 Misc. 448, 64 State Rep. 782, 31 N. Y. Supp. 871.

¹¹⁸ *Mayer v. Liebmann*, 16 App. Div. 54, 44 N. Y. Supp. 1067.

¹¹⁹ Volume 2, p. 2198.

¹²⁰ *Salisbury v. McClaskey*, 26 Hun, 262; *Hayes v. Thompson*, 15 Abb. Pr. (N. S.) 220.

son disqualified to act as a juror by relationship to a party must be urged by the party related to the juror before the case is opened, yet any other party to the issue may raise the objection within six months from the date of the verdict.¹²¹ It follows that a new trial should not be granted merely because facts are shown which might have been adduced on the trial of a challenge, especially where unaccompanied by proof that the juror was unduly influenced.¹²² The mere fact that one of the jurors was a deputy sheriff is not ground for setting aside the verdict in an action against the sheriff.¹²³ A motion for a new trial will not be granted because a juror was not sworn where no objection was taken and no prejudice therefrom is apparent.¹²⁴

§ 1930. Newly-discovered evidence.

Motions for a new trial on the ground of newly-discovered evidence are not governed by any well defined rules but depend to a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end.¹²⁵ The newly-discovered evidence may consist of a writing,¹²⁶ but a subsequent discovery of the importance of documents is not ground for a new trial.¹²⁷ Newly-discovered law is not newly-

¹²¹ Code Civ. Proc. § 1166.

¹²² *Cain v. Ingham*, 7 Cow. 478.

¹²³ *Stedman v. Batchelor*, 49 Hun, 390, 3 N. Y. Supp. 580, 19 State Rep. 518.

¹²⁴ *Hardenburgh v. Crary*, 15 How. Pr. 307.

¹²⁵ *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Kring v. New York Cent. & H. R. R. Co.*, 45 App. Div. 373, 60 N. Y. Supp. 1114; *Glassford v. Lewis*, 82 Hun, 46, 63 State Rep. 484, 31 N. Y. Supp. 162; *Clark v. New York Cent. & H. R. R. Co.*, 4 App. Div. 321, 74 State Rep. 183, 38 N. Y. Supp. 563; *Jones v. Lustig*, 37 Misc. 834, 76 N. Y. Supp. 975.

¹²⁶ *Berger Mfg. Co. v. Block*, 69 App. Div. 186, 74 N. Y. Supp. 753.

¹²⁷ *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 312, 48 State Rep. 782, 20 N. Y. Supp. 715.

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discovered evidence.¹²⁸ Thus, a subsequent decision of the court of last resort which is deemed to control the determination of an action adversely to that rendered is not newly-discovered evidence.¹²⁹ So the passage of a statute after the trial but before the entry of judgment, which makes that competent as evidence which was not so before, will not warrant a new trial.¹³⁰

In order to obtain a new trial on the ground of newly-discovered evidence, the following facts must appear:¹³¹

1. That the newly-discovered evidence has been discovered since the trial.¹³² The testimony of a witness known before the trial, though he could not be found to be subpoenaed, is not newly-discovered evidence.¹³³ So facts known to the party before the trial but forgotten by him do not constitute newly-discovered evidence.¹³⁴ And facts within the knowledge of an agent or servant are within the knowledge of the principal.¹³⁵ But a new trial may be granted to admit in evidence an in-

¹²⁸ *Forstman v. Schulting*, 38 Hun, 482; *Babcock v. People*, 15 Hun, 347.

¹²⁹ *Forstman v. Schulting*, 38 Hun, 482.

¹³⁰ *Cole v. Fall Brook Coal Co.*, 87 Hun, 584, 68 State Rep. 636, 34 N. Y. Supp. 572.

¹³¹ *People v. New York Super. Ct.*, 10 Wend. 285; *Powell v. Jones*, 42 Barb. 24; *Glassford v. Lewis*, 82 Hun, 46, 63 State Rep. 484, 31 N. Y. Supp. 162; *Haight v. City of Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193.

¹³² *Vandervoort v. Smith*, 2 Caines, 155; *Jackson v. Crosby*, 12 Johns. 354; *Losee v. Mathews*, 61 N. Y. 627; *Haight v. City of Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193. Evidence discovered by and within reach of a party, after close of the evidence, but before completion of the trial, and submission of the case to the jury, is not newly-discovered evidence. *Dodge v. New York & W. S. S. Co.*, 6 Abb. Pr. (N. S.) 451, 37 How. Pr. 524.

¹³³ *Ranous v. Trageser*, 1 Wkly. Dig. 25; *Hartman v. Morning Journal Ass'n*, 46 State Rep. 403, 19 N. Y. Supp. 401.

¹³⁴ *People v. New York Super. Ct.*, 10 Wend. 285; *Wilcox v. Joslin*, 32 State Rep. 423, 10 N. Y. Supp. 342. But where many years have elapsed since the occurrence, the failure to remember may be excused and a new trial granted. *Huebner v. Roosevelt*, 7 Daly, 111.

¹³⁵ *Weston v. New York El. R. Co.*, 42 Super. Ct. (10 J. & S.) 156.

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strument which was lost at the time of the trial,¹³⁶ although parol evidence of its contents was then given;¹³⁷ but the motion will be denied if a search was not made before the trial.¹³⁸

2. That the newly-discovered evidence could not have been obtained upon the former trial by the exercise of reasonable diligence.¹³⁹ Thus if the evidence was known of at the time of the trial and was not produced because it was not deemed material or necessary, a new trial will not be granted.¹⁴⁰ So a new trial should not be granted where the witnesses relied on were both present at the trial and the party made no inquiries of either of them until after an appeal had been taken by him.¹⁴¹ And a new trial should not be granted where a witness for the applicant, upon the trial, who was the only person from whom such evidence could be obtained, was not interrogated upon the subject, even though before the trial he had denied his ability to give the evidence.¹⁴² So the fact that the witness to be produced was in the court room at the trial and was not called as a witness is a sufficient reason for denying the motion although the party did not know what the witness would testify to.¹⁴³ In short, newly-discovered evidence is not a ground where the witness was present at the

¹³⁶ *Platt v. Munroe*, 24 Barb. 291; *Katz v. Atfield*, 1 Misc. 217, 20 N. Y. Supp. 892, 49 State Rep. 923.

¹³⁷ *Hodge v. Denny*, 6 Alb. Law J. 192. It seems, however, that a new trial should be granted only where it is apparent that the documentary evidence will produce a different result from that produced by the secondary evidence.

¹³⁸ *Galley v. Sears*, 30 Super. Ct. (7 Rob.) 111.

¹³⁹ *Pospisil v. Kane*, 73 App. Div. 457, 77 N. Y. Supp. 397; *McIver v. Hallen*, 50 App. Div. 441, 64 N. Y. Supp. 26; *Jackson v. Crosby*, 12 Johns. 354; *Glassford v. Lewis*, 82 Hun, 16, 31 N. Y. Supp. 162; *Smith v. Clews*, 14 Alb. N. C. 465; *Broadbent v. Loew*, 21 Misc. 169, 47 N. Y. Supp. 73; *Thompson v. Welde*, 27 App. Div. 186, 50 N. Y. Supp. 618.

¹⁴⁰ *Dillingham v. Flack*, 42 State Rep. 806, 17 N. Y. Supp. 867.

¹⁴¹ *Simonowitz v. Schwartz*, 73 App. Div. 489, 77 N. Y. Supp. 209.

¹⁴² *Smith v. Clews*, 14 Alb. N. C. 465.

¹⁴³ *Conable v. Smith*, 46 State Rep. 2, 19 N. Y. Supp. 446; *Conable v. Keeney*, 16 State Rep. 5, 19 N. Y. Supp. 449.

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trial and with ordinary diligence it could have been discovered what facts were within his knowledge.¹⁴⁴

3. That the newly-discovered evidence is material to the issue and goes to the merits of the case.¹⁴⁵ It is not sufficient that the newly-discovered evidence apply to new issues to be raised by an amendment of the pleadings.¹⁴⁶

4. That the newly-discovered evidence is not merely cumulative.¹⁴⁷ Cumulative evidence is defined as "evidence of the same kind and to the same point."¹⁴⁸ For instance, additional evidence to support a point which was the subject of inquiry and testified to, on the trial, such as the degree of injury to the plaintiff in an action for an assault, is substantially cumulative.¹⁴⁹ It is additional evidence to support the same point and which is of the same character with evidence already produced.¹⁵⁰ Newly-discovered evidence is not cumulative unless it is of the same quality or description given on the trial of the action.¹⁵¹ If newly-discovered evidence relates to any fact proved or controverted, whether bearing on the issue directly or collaterally, it is cumulative,¹⁵² but facts may tend to prove the same proposition and yet be so dissimilar in kind as to afford no pretense for saying they are cumulative.¹⁵³ For instance where the evidence given on the trial as to a certain matter is wholly circumstantial and the evidence newly-discovered is positive and direct, such evidence is not cumulative.¹⁵⁴

¹⁴⁴ *Bridenbecker v. Bridenbecker*, 75 App. Div. 6, 77 N. Y. Supp. 802.

¹⁴⁵ *Vandervoort v. Smith*, 2 Caines, 155; *Wilcox v. Joslin*, 32 State Rep. 423, 10 N. Y. Supp. 342; *Alliger v. Mail Print. Ass'n*, 47 State Rep. 205, 19 N. Y. Supp. 584; *Reiffeld v. Delaware & H. Canal Co.*, 20 App. Div. 635, 47 N. Y. Supp. 226; *Litchfield v. Sisson*, 43 Misc. 411, 89 N. Y. Supp. 338.

¹⁴⁶ *Anderson v. Market Nat. Bank*, 66 How. Pr. 8.

¹⁴⁷ *Halsey v. Watson*, 1 Caines, 24; *Kring v. New York Cent. & H. R. R. Co.*, 45 App. Div. 373, 60 N. Y. Supp. 1114; *Bastian v. Keystone Gas Co.*, 27 App. Div. 584, 50 N. Y. Supp. 537.

¹⁴⁸ 14 Enc. Pl. & Pr. 812.

¹⁴⁹ *Tripler v. Eehalt*, 28 Super. Ct. (5 Rob.) 609.

¹⁵⁰ *People v. New York Super. Ct.*, 10 Wend. 285.

¹⁵¹ *Wilcox Silver Plate Co. v. Barclay*, 48 Hun, 54, 14 Civ. Proc. R. (Browne) 211, 14 State Rep. 879.

¹⁵² *Leavy v. Roberts*, 2 Hilt. 285; *Peck v. Hiler*, 30 Barb. 655.

^{153, 154} *Guyot v. Butts*, 4 Wend. 579.

But evidence proposed to be given to prove new facts not proved on the former trial is not deemed cumulative.¹⁵⁵ The courts of this state, however, evince a readiness to break away from this rule as to cumulative evidence which seems to be more honored by its breach than its observance. It has been held repeatedly that the fact that the newly-discovered evidence is cumulative does not necessarily afford ground for denying a motion for a new trial,¹⁵⁶ but that a new trial may be granted where required by substantial justice.¹⁵⁷ The rule supported by reason seems to be that a new trial may be granted though the evidence is cumulative if it is of such importance that it will probably change the result.¹⁵⁸ Cumulative expert opinion is not ground for a new trial.¹⁵⁹

5. The newly-discovered evidence must be of such a degree of cogency and importance as to give reasonable ground to believe that its production will cause a different result from that arrived at on the former trial.¹⁶⁰ Thus, if the newly-discovered evidence consists of the opinions of experts, a new trial will not be granted.¹⁶¹

The general rule is that newly-discovered evidence which merely impeaches the credit of a witness examined on the trial

¹⁵⁵ *Parshall v. Klineck*, 43 Barb. 203.

¹⁵⁶ *Kring v. New York Cent. & H. R. R. Co.*, 45 App. Div. 373, 60 N. Y. Supp. 1114; *Hess v. Sloane*, 47 App. Div. 585, 62 N. Y. Supp. 666; *Vollkommer v. Nassau Elec. R. Co.*, 23 App. Div. 88, 48 N. Y. Supp. 372.

¹⁵⁷ *Clegg v. New York Newspaper Union*, 51 Hun, 232, 21 State Rep. 215, 4 N. Y. Supp. 280; *Bulkin v. Ehret*, 29 Abb. N. C. 62, 20 N. Y. Supp. 731.

¹⁵⁸ *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274; *Benta v. Harris*, 27 Misc. 648, 58 N. Y. Supp. 395; *Hagen v. New York Cent. & H. R. R. Co.*, 44 Misc. 549, 90 N. Y. Supp. 125.

¹⁵⁹ *Piehl v. Albany R. Co.*, 30 App. Div. 166, 51 N. Y. Supp. 755.

¹⁶⁰ *Jackson v. Crosby*, 12 Johns. 354; *Laing v. Rush*, 50 State Rep. 351, 21 N. Y. Supp. 822; *Brady v. Industrial Ben. Ass'n*, 79 Hun, 156, 61 State Rep. 360, 29 N. Y. Supp. 768; *White v. Town of Ellisburgh*, 18 App. Div. 514, 45 N. Y. Supp. 1122; *O'Harra v. New York Cent. & H. R. R. Co.*, 92 Hun, 56, 71 State Rep. 763, 36 N. Y. Supp. 567; *Moorhead v. Webster*, 77 N. Y. Supp. 1062.

¹⁶¹ *Sullivan v. Dahlman*, 1 City Ct. R. 475. See, also, *Piehl v. Albany R. Co.*, 30 App. Div. 166, 51 N. Y. Supp. 755.

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is not sufficient ground for granting a new trial;¹⁶² but such rule is subject to an exception where the evidence, in addition, has intrinsic probative value, as where the main object of the testimony is to contradict the evidence of a witness on a material issue.¹⁶³ A new trial may be granted where a witness is produced who states that plaintiff made a contradictory statement to him,¹⁶⁴ but a new trial will not generally be granted to admit proof of admissions of a party as newly-discovered evidence,¹⁶⁵ though a new trial may be granted on such ground,¹⁶⁶ since not necessarily impeaching the veracity of the witness. So a new trial is not usually granted because of the discovery of inconsistent admissions by a witness who was not a party.¹⁶⁷ And a new trial will not ordinarily be granted because of newly-discovered evidence of perjury of witnesses where proof of such perjury is furnished entirely by confessions of such witnesses themselves.¹⁶⁸ But a new trial may be granted on the ground of newly-discovered evidence showing that the witnesses for the plaintiff on whose testimony the judgment was recovered were guilty of perjury and that the judgment was obtained by means of a conspiracy between the plaintiff and one of her attorneys.¹⁶⁹ The use of false testimony, knowing it to be such, is ground for a new trial, although it was attacked as perjured on the former trial, if it affected the result, notwithstanding the rule as to cumu-

¹⁶² *Bunn v. Hoyt*, 3 Johns. 255; *Rubenfeld v. Rabiner*, 23 App. Div. 374, 54 N. Y. Supp. 68; *Corley v. New York & H. R. Co.*, 12 App. Div. 409, 42 N. Y. Supp. 941. See *Jackson v. Kinney*, 14 Johns. 186, where new trial was allowed.

¹⁶³ *Hess v. Sloane*, 47 App. Div. 585, 62 N. Y. Supp. 666. See, also, *Hagen v. New York Cent. & H. R. R. Co.*, 44 Misc. 540, 90 N. Y. Supp. 125.

¹⁶⁴ *Weber v. Weber*, 5 N. Y. Supp. 178.

¹⁶⁵ *Guyot v. Butts*, 4 Wend. 579.

¹⁶⁶ *Guyot v. Butts*, 4 Wend. 579; *Oakley v. Sears*, 24 Super. Ct. (1 Rob.) 73, 1 Abb. Pr. (N. S.) 368.

¹⁶⁷ *Carpenter v. Coe*, 67 Barb. 411. But see *Chapman v. Delaware, L. & W. R. Co.*, 92 N. Y. Supp. 304.

¹⁶⁸ *Holtz v. Schmidt*, 44 Super. Ct. (12 J. & S.) 327; *People v. McGuire*, 2 Hun, 269, 4 T. & C. 658.

¹⁶⁹ *Nugent v. Metropolitan St. R. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476.

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lative newly-discovered evidence.¹⁷⁰ A conviction of perjury has been held necessary before a new trial will be granted on the ground of the perjury of a witness,¹⁷¹ but the decision has not been followed and is not supported by reason. A fraudulent concealment by plaintiff of evidence that materially affected his right of recovery has been held ground for a new trial.¹⁷² But a new trial to admit evidence to contradict an express admission of the moving party will not be granted.¹⁷³

If plaintiff recovers a large verdict for personal injuries on the ground that the injuries are permanent, a new trial may be granted on affidavits showing that the plaintiff was substantially a well man a short time after the trial.¹⁷⁴

If it appears that the moving party has acted in a transaction in bad faith, relief should not be granted him,¹⁷⁵ nor where the granting of the motion would result in the perpetration of a fraud.¹⁷⁶ But it is no objection to the motion that the newly-discovered evidence will show that one of the applicant's witnesses on the former trial was mistaken.¹⁷⁷

§ 1931. Surprise.

"Surprise," as ground for a new trial, means an unexpected state of facts by which the interests of the party may be injuriously affected, and which arises as the result of conditions of which he was ignorant, and which he could not foresee and avoid by the exercise of ordinary prudence.¹⁷⁸ Surprise has also been defined as an unexpected situation of a party resulting from accident or mistake, by which the adverse party acquires some advantages or legal rights not consonant with

¹⁷⁰ *Klinger v. Markowitz*, 54 App. Div. 299, 65 N. Y. Supp. 369.

¹⁷¹ *Holtz v. Schmidt*, 44 Super. Ct. (12 J. & S.) 327.

¹⁷² *Harris v. Ditson*, 13 State Rep. 337.

¹⁷³ *Vandervoort v. Smith*, 2 Caines. 155.

¹⁷⁴ *Harold v. New York El. R. Co.*, 16 Wkly. Dig. 271; *Brooks v. Rochester R. Co.*, 10 Misc. 88, 31 N. Y. Supp. 179; *Corley v. New York & H. R. Co.*, 12 App. Div. 409, 42 N. Y. Supp. 941.

¹⁷⁵ *Kapner v. Betz*, 51 Super. Ct. (19 J. & S.) 18.

¹⁷⁶ *Chester v. Jumel*, 39 State Rep. 319, 10 N. Y. Supp. 57.

¹⁷⁷ *Bulkin v. Ehret*, 29 Abb. N. C. 62, 20 N. Y. Supp. 731.

¹⁷⁸ *Hayne*, New Trials, §§ 84-86.

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justice or equity.¹⁷⁹ As used herein, it includes accident and mistake. A new trial will not be granted for surprise unless it appears (a) that the mistake or accident was such that ordinary prudence could not have guarded against it;¹⁸⁰ (b) that the mistake was not due to ignorance of the law; (c) that the result will probably be different if a new trial is granted; (d) that the applicant made prompt complaint of the surprise; (e) and that the misfortune could not have been averted by the introduction of other available testimony, by a continuance, or by a voluntary discontinuance.¹⁸¹ In other words, a party alleging surprise as ground for relief must show that some act prejudicial to him has been done, which, with proper inquiry into the facts of the case, he could not have anticipated and against which he could not, with due vigilance, have protected himself.¹⁸² The motion is addressed very much to the sound discretion of the court which will be exercised according to whether it satisfactorily appear that to promote the ends of justice an opportunity should be presented for introduction of new testimony.¹⁸³ The surprise must relate to material matters,¹⁸⁴ and must be upon the facts and not on questions of law.¹⁸⁵ Furthermore, the surprise must not be as to

¹⁷⁹ 14 Enc. Pl. & Pr. 722. The practice allowing new trials on the ground of surprise includes only matters of fact required to be sustained by affidavits or other proofs bringing forward circumstances not appearing upon the trial and tending to show that by contrivance or design, or some unexpected occurrence, the party making the application has been prevented from bringing forward his proof and trying the cause as he may have had the ability to do it, or that he has been misled by some unanticipated circumstance first arising during the progress of the trial. *Woolley v. Stevens*, 17 Wkly. Dig. 382.

¹⁸⁰ Surprise is not ground for a new trial where the parties asking for relief have been guilty of laches in not making inquiry as to facts of which they were apprised by the pleadings. *Soule v. Oosterhoudt*, 20 Wkly. Dig. 67.

¹⁸¹ 14 Enc. Pl. & Pr. 723.

¹⁸² *Craig v. Fanning*, 6 How. Pr. 336.

¹⁸³ *Tyler v. Hoornbeck*, 48 Barb. 197.

¹⁸⁴ *McClave v. Gibb*, 11 Misc. 708, 63 State Rep. 458, 31 N. Y. Supp. 1130.

¹⁸⁵ *Madison University v. White*, 25 Hun, 490; *Perkins v. Brainerd*

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the result of the suit. For instance, the ground of surprise is not available where the party, not being misled by his opponent, did not present the evidence because he thought it would not affect the result or was not necessary for his success, the surprise in such case being rather in the result of the suit.¹⁸⁶ So a new trial will not be granted on the ground that the plaintiff was surprised by the ground of objection taken at the trial and did not come prepared to meet it.¹⁸⁷ Nor will a new trial be granted for surprise because the party was misled by an intimation of the court as to the state of the issue or as to its disposition.¹⁸⁸

— **As to evidence.** The question of surprise arises where there is a variance between the allegations of a pleading and the proof,¹⁸⁹ but the admission of unexpected, though competent, evidence, does not constitute such surprise as calls for a new trial.¹⁹⁰ The general rule is that a new trial will not be granted on the ground of surprise if the evidence is within the issues.¹⁹¹ A claim of surprise cannot be predicated on evidence brought out on cross-examination of the moving party and his witness,¹⁹² nor on the unexpected strength of the opposing testimony,¹⁹³ nor on the unexpected effect produced by the evidence on the mind of the court.¹⁹⁴ So a new trial will

Quarry Co., 11 Misc. 328, 65 State Rep. 410, 32 N. Y. Supp. 230. But a new trial has been granted because of surprise in the ruling of the Judge that an instrument was a mortgage so that it required a different revenue stamp from that affixed thereto. *Hoppock v. Stone*, 49 Barb. 524.

¹⁸⁶ *Smith v. Rentz*, 73 Hun, 195, 25 N. Y. Supp. 914; *Northampton Nat. Bank v. Kidder*, 50 Super. Ct. (18 J. & S.) 246. Followed in *Emmerich v. Hefferan*, 53 Super. Ct. (21 J. & S.) 98.

¹⁸⁷ *Jackson v. Roe*, 9 Johns. 77.

¹⁸⁸ *Shuttleworth v. Winter*, 55 N. Y. 624.

^{189, 190} *Farmers' & Citizens' Bank v. Sherman*, 33 N. Y. 69. Where an amendment to conform to the proof is made, but inability to produce evidence to meet the amendment is not suggested, a new trial will not be granted. *Carlisle v. Barnes*, 45 Misc. 6, 90 N. Y. Supp. 810.

¹⁹¹ *Cole v. Fall Brook Coal Co.*, 32 State Rep. 762, 10 N. Y. Supp. 417. See *Pospisil v. Kane*, 73 App. Div. 457, 77 N. Y. Supp. 307.

¹⁹² *Grupe v. Brady*, 51 Super. Ct. (19 J. & S.) 513.

¹⁹³ *Seaman v. Koehler*, 12 State Rep. 582.

¹⁹⁴ *In re Ramsdell*, 3 N. Y. Supp. 499, 20 State Rep. 446.

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not be granted on the ground of surprise because the action was determined on an unexpected point concerning which evidence, though available, was not produced.¹⁹⁵ And the fact that plaintiff and his counsel led defendant to believe that certain facts would be admitted or not seriously disputed at the trial, so that he was induced to omit preparing evidence, is not such surprise as calls for a new trial where there is no fraud nor positive stipulation.¹⁹⁶ So a party cannot have a new trial, on the ground of surprise, to enable him to rebut testimony which he was aware, before the former trial, might be introduced.¹⁹⁷ But surprise may consist in testimony which, although admissible under the pleadings, is not testimony that a practitioner of ordinary prudence could have anticipated.¹⁹⁸ And the rejection of a deposition on the ground of misnomer of the deponent may warrant a new trial for surprise.¹⁹⁹

— **As to witnesses.** A new trial may be granted if a witness of the moving party was absent under circumstances which were not due to any negligence of the applicant, and the better rule seems to be that it is not a condition to granting the relief that the witness should have been subpoenaed provided he was notified and promised to attend.²⁰⁰ A new trial should be granted where a witness who is in attendance absents himself shortly before the case is called, especially where he has been regularly subpoenaed,²⁰¹ but the absence of witnesses who were known to be absent at the time of the trial is not such surprise as authorizes a new trial where the party took no measures to enforce their attendance.²⁰² If course, if

¹⁹⁵ *Dillingham v. Flack*, 43 State Rep. 806, 17 N. Y. Supp. 867.

¹⁹⁶ *Taylor v. Harlow*, 11 How. Pr. 285; *Chamberlain v. Lindsay*, 1 Hun, 231, 4 T. & C. 23. But see *Continental Nat. Bank v. Adams*, 67 Barb. 318, 4 Hun, 666.

¹⁹⁷ *Meakim v. Anderson*, 11 Barb. 215.

¹⁹⁸ *Rubenfeld v. Rabiner*, 33 App. Div. 374, 54 N. Y. Supp. 68.

¹⁹⁹ *Hays v. Phelps*, 3 Super. Ct. (1 Sandf.) 64.

²⁰⁰ See *Smith v. Lidgerwood Mfg. Co.*, 60 App. Div. 467, 69 N. Y. Supp. 975. Contra, *Tigue v. Annowski*, 24 State Rep. 931, 7 N. Y. Supp. 9.

²⁰¹ *Ruggles v. Hall*, 14 Johns. 112; *Tilden v. Gardinier*, 25 Wend. 663.

²⁰² *Brady v. Valentine*, 3 Misc. 19, 50 State Rep. 570, 21 N. Y. Supp. 776.

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a witness is absent, the party should move for a postponement or to withdraw a juror.²⁰⁵ Where one subpoenaed to produce a paper did not give notice that he did not have it until the trial, there was surprise authorizing a new trial.²⁰⁴ A new trial will not be granted on the ground of surprise, which arose from the production of an unexpected witness to certain facts, to impeach whom no preparation had been made, and the omission to call an anticipated witness, whose impeachment had been prepared for.²⁰⁶ And a new trial will not be granted because of the failure of a witness to testify as he had promised.²⁰⁸ But a new trial may be granted because of the calling of a witness in violation of a promise not to call him.²⁰⁷ So a new trial may be granted because of surprise occasioned by the sudden insanity of a witness developed during the trial.²⁰⁸

— **Mistake of witness.** The better rule seems to be that a new trial may be granted because of a mistake in the testimony of a witness where the circumstances render it probable that the mistake decided the verdict,²⁰⁹ though it has been held that a new trial will not be granted on an affidavit by a witness that he was mistaken or surprised on his examination, and explaining and correcting the same.²¹⁰

— **Absence of counsel.** Absence of counsel at the trial is not ordinarily a ground for granting a new trial because of surprise.²¹¹

²⁰⁴ *Gawthrop v. Leary*, 9 Daly, 353; *Leonard v. Germania F. Ins. Co.*, 2 Misc. 548, 23 Civ. Proc. R. (Browne) 155, 23 N. Y. Supp. 684.

²⁰⁵ *Jackson v. Warford*, 7 Wend. 62.

²⁰⁶ *Beach v. Tooker*, 10 How. Pr. 297.

²⁰⁷ *Schultz v. Third Ave. R. Co.*, 47 Super. Ct. (15 J. & S.) 285.

²⁰⁸ *Tyler v. Hoornbeck*, 48 Barb. 197.

²⁰⁹ *Helwig v. Second Ave. R. Co.*, 9 Misc. 61, 59 State Rep. 540, 29 N. Y. Supp. 9.

²¹⁰ *Coddington v. Hunt*, 6 Hill, 595. Followed in *Huson v. Egan*, 25 State Rep. 906, 6 N. Y. Supp. 661.

²¹¹ *Steinbach v. Columbian Ins. Co.*, 2 Caines, 129. Followed in *Mersereau v. Pearsall*, 6 How. Pr. 293.

²¹² *Steinbach v. Columbian Ins. Co.*, 2 Caines, 129, *Colem. & C. Cas.* 374; *McKay v. Marine Ins. Co.*, 2 Caines, 384; *Smith v. Osborn*, 45 How. Pr. 351; *Simmons v. Murray*, 1 State Rep. 85. See, also, ante, p. 2699.

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— **Motion to adjourn or to withdraw juror.** A new trial will not be granted on the ground of surprise unless the party, at the time of the surprise, calls the attention of the court thereto and applies either for a postponement or to withdraw a juror.²¹² Thus if plaintiff is surprised by evidence which he is not prepared to rebut, he should move for an adjournment or for leave to withdraw a juror or else he is not entitled to a new trial on the ground of surprise.²¹³ An exception to this rule has been made, however, where reliance was placed on statements made by the opposing counsel before the trial,²¹⁴ and where a statement by the court misled counsel into a belief that it was not necessary to introduce any evidence in denial of a certain matter as to which the complaint was silent.²¹⁵ So where the party is informed by the court that he should have been prepared in advance to meet the proof permitted by an amendment of a pleading, it is not necessary that a postponement be sought, since such ruling, if correct, would require the denial of a motion to postpone.^{216a} Of course, if defendant is surprised, he cannot move to withdraw a juror but it is sufficient that he asks a postponement.

§ 1932. Defects in pleadings.

A motion for a new trial cannot be based on the ground of defective pleadings.²¹⁶

§ 1933. Failure of court to file decision.

If, on a trial by the court of an issue of fact or of law, its

²¹² *Rubenfeld v. Rabiner*, 33 App. Div. 374, 54 N. Y. Supp. 68; *Soule v. Oosterhoudt*, 20 Wkly. Dig. 67; *Messenger v. Fourth Nat. Bank*, 48 How. Pr. 542; *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 312, 48 State Rep. 782, 20 N. Y. Supp. 715; *Harvey v. Fargo*, 91 N. Y. Supp. 84.

²¹³ *Dixon v. Brooklyn Heights R. Co.*, 68 App. Div. 302, 74 N. Y. Supp. 49.

²¹⁴ *Tyler v. Hoornbeck*, 48 Barb. 197; *Continental Nat. Bank v. Adams*, 67 Barb. 318.

²¹⁵ *Merritt v. Mayfield*, 89 App. Div. 470, 85 N. Y. Supp. 801.

^{215a} *Oats v. New York Dock Co.*, 99 App. Div. 487, 90 N. Y. Supp. 878.

²¹⁶ *Meyer v. McLean*, 1 Johns. 509; *Sargent v. —*, 5 Cow. 106.

Failure of Court to File Decision.

decision in writing is not filed in the clerk's office within twenty days after the final adjournment of the term where the issue was tried, either party may move at a special term for a new trial on that ground,²¹⁷ but the right to so move may be lost by laches on the part of the moving party.²¹⁸

²¹⁷ Code Civ. Proc. § 1010.

²¹⁸ *Fleet v. Kallfelzsch*, 47 Hun 443, 6 State Rep. 755.

CHAPTER III.

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ART. I. MOTION ON MINUTES OF TRIAL JUDGE.

§ 1934. Code provisions.

Section 999 of the Code provides that "the judge presiding at a trial by a jury may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict, or a direction dismissing the complaint, and grant a new trial, upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary to the evidence or contrary to law." It will be noticed that this provision applies only to a trial by a jury.¹ Section 1003 of the Code permits a motion for a new trial on the judge's minutes after a trial by jury of one or more specific questions of fact, arising on the issues, in an equity action triable by the court.²

¹ Knight v. Sackett & W. Lithographing Co., 141 N. Y. 404; Rosenquest v. Canary, 27 App. Div. 30, 50 N. Y. Supp. 111; Simpson v. Hefter, 43 Misc. 608, 88 N. Y. Supp. 282.

² Code Civ. Proc. § 1003.

§ 1935. Where complaint is dismissed.

Formerly a new trial could not be ordered on the judge's minutes if there was no verdict but the complaint was dismissed,³ but section 999 of the Code expressly provides otherwise since its amendment in 1889. If there is a dismissal of the complaint, the motion can be heard, however, only on exceptions.⁴

§ 1936. Time for motion.

The motion must be made at the same term of court the trial is had.⁵ The motion cannot be made after the expiration of the term even where the trial judge has so directed,⁶ or a special term order grants leave to do so.⁷ If the motion is made at a later term, however, by consent, the court has jurisdiction to act.⁸ The motion is usually made at the close of the trial immediately after the verdict is announced in which case the judge may direct a hearing on a later day in the term or even on a day in a subsequent term.

§ 1937. Notice of motion.

Written notice of motion need not be given where the motion is brought on immediately after the rendition of the verdict.⁹ But a notice of motion should be given or an order to show cause obtained if the motion is not made at the close of the trial unless the attorneys agree on some day for the hearing.

§ 1938. Grounds of motion.

The motion must be based (a) on exceptions or on the

³ *Van Doren v. Horton*, 19 Hun, 7; *First Nat. Bank of Union Mills v. Clark*, 42 Hun, 90.

⁴ *Snelling v. Yetter*, 25 App. Div. 590.

⁵ Code Civ. Proc. § 999.

⁶ *Thayer Mfg. Jewelry Co. v. Steinau*, 58 How. Pr. 315.

⁷ *Ibbotson v. King*, 42 Super. Ct. (10 J. & S.) 207; *Rollins v. Sidney B. Bowman Cycle Co.*, 96 App. Div. 365, 89 N. Y. Supp. 289.

⁸ *Courtney v. Baker*, 60 N. Y. 1, 7.

⁹ *Pharis v. Gere*, 107 N. Y. 231, 233.

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ground (b) that the verdict is for excessive or insufficient damages or (c) that the verdict is contrary to the evidence or (d) that the verdict is contrary to law. The Code section as amended nullifies a former decision that a new trial cannot be granted on the judge's minutes because the verdict is contrary to the instructions of the court, i. e., contrary to law.¹⁰ It has been held that the judge cannot grant a new trial on his minutes for causes not enumerated in section 999 of the Code as just mentioned¹¹ though there is authority to the contrary.¹² A new trial has been granted on the judge's minutes because of improper remarks of the trial judge,¹³ and also because the judge propounded improper questions to witnesses.¹⁴ A motion based on the ground of surprise cannot be made on the judge's minutes,¹⁵ nor can a motion based on irregularities not subject to exception or based on newly-discovered evidence. A new trial cannot be granted except for matters raised by exceptions taken on the trial where both parties have joined in a request for the direction of a verdict.¹⁶ The judge ought to examine the correctness of his rulings on the trial.¹⁷

—**Stating grounds in motion.** The motion should state the ground or grounds of the motion,¹⁸ since if it is does not and the motion is denied, the ruling will not be reviewed in the appellate division.¹⁹

¹⁰ *Tinson v. Welch*, 51 N. Y. 214.

¹¹ *Swartout v. Willingham*, 31 Abb. N. C. 66, 6 Misc. 179, 26 N. Y. Supp. 769; *Pharis v. Gere*, 107 N. Y. 231, 233. Inasmuch as section 1002 of the Code provides that "in a case not specified in the last three sections" the motion "must" be heard at the special term, this rule seems more in harmony with the Code.

¹² *Campanelli v. New York Cent. & H. R. R. Co.*, 39 State Rep. 445, 15 N. Y. Supp. 670.

¹³ *Davison v. Herrling*, 24 App. Div. 402.

¹⁴ *Botte v. Third Ave. R. Co.*, 38 App. Div. 234, 57 N. Y. Supp. 1134.

¹⁵ *Argall v. Jacobs*, 21 Hun. 114.

¹⁶ *Banker v. Knibloe*, 69 Hun. 539, 53 State Rep. 289, 23 N. Y. Supp. 1691.

¹⁷ *Gerald v. Quam*, 10 Abb. N. C. 28.

¹⁸ *De Luce v. Kelly*, 5 Wkly. Dig. 32.

¹⁹ *Gray v. New York Floating Elevator Co.*, 13 Wkly. Dig. 140;

§ 1939. Stenographer's notes treated as minutes of the judge.

The notes of an official stenographer or assistant stenographer, taken at a trial, when written out at length, may be treated, in the discretion of the judge, as minutes of the judge upon the trial for the purposes of a motion for a new trial.²⁰ The error complained of cannot be shown by affidavits or other papers, but must be apparent from such minutes.

§ 1940. Who may grant.

The judge of any court of record, including a county judge, has power to grant a new trial on his minutes.²¹ County courts may grant new trials on motions made on their own minutes even in an action originating in a justice court.²²

§ 1941. Discretion of judge.

It is in the discretion of the trial judge whether he shall hear the motion on his minutes or direct it to be heard on a case and exceptions,²³ but it is the usual and better practice not to hear the motion on the minutes where the questions involved are doubtful or complicated.²⁴ Whether the motion, if heard, shall be granted, also rests to a large extent in the discretion of the trial judge except where the motion is based on exceptions or on the ground that the verdict is contrary to law.

§ 1942. Exceptions as a condition precedent.

An exception is not necessary to authorize a review on the judge's minutes of alleged error in the charge²⁵ or in rejecting

Hinman v. Stillwell, 34 Hun, 178. This rule does not apply, however, where enough appears to show what was the ground. *Cowles v. Watson*, 14 Hun, 41.

²⁰ Code Civ. Proc. § 1007. Notes need not be filed as motion papers on which order is based. *Schlotterer v. Brooklyn & N. Y. Ferry Co.*, 102 App. Div. 363, 92 N. Y. Supp. 674.

²¹ *Kenner v. Morrison*, 12 Hun, 204.

²² *Hinman v. Stillwell*, 34 Hun, 178.

²³ *Magnus v. Buffalo R. Co.*, 24 App. Div. 449, 48 N. Y. Supp. 490.

²⁴ *Hinman v. Stillwell*, 34 Hun, 178.

²⁵ *Bronson v. New York Cent. & H. R. R. Co.*, 24 App. Div. 262, 48

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or receiving evidence. And the better rule seems to be that the omission to move for a nonsuit or a directed verdict and to except to the ruling thereon does not preclude a motion to set aside the verdict on the ground of the insufficiency of the evidence or that the verdict is contrary to law or on any of the other grounds specified in section 999 of the Code,²⁶ though some attempt has been made to distinguish between a verdict supported by "no" evidence and a verdict against the evidence.²⁷ So a verdict improperly influenced by a misdirection of the judge or by prejudicial statements will be set aside though no exception was taken at the trial.²⁸

ART. II. MOTION FOR HEARING BY APPELLATE DIVISION.

§ 1943. After trial by jury.

The Code provides as follows: "Upon the application of a party who has taken one or more exceptions, the judge presiding at a trial by a jury, may, in his discretion, at any time during the same term, direct an order to be entered, that the exceptions so taken be heard, in the first instance, by the appellate division of the supreme court; and that judgment be suspended in the meantime. At any time before the hearing of the exceptions, the order may be revoked or modified, upon notice, in court or out of court, by the judge who made it, or it may be set aside for irregularity, by the court, at any term thereof. Unless it is so revoked or set aside, the exceptions must be heard upon a motion for a new trial, which must be decided by the appellate division. The motion is deemed to

N. Y. Supp. 257, which reviews the authorities. *Dovale v. Ackerman*, 11 Misc. 215, 33 N. Y. Supp. 13, which goes on the theory that if there are erroneous instructions the verdict is "contrary to law" within section 999 of the Code.

²⁶ *Haist v. Bell*, 24 App. Div. 252, 48 N. Y. Supp. 405; *Picard v. Lang*, 3 App. Div. 51, 54, 56, 38 N. Y. Supp. 229. Followed in *Mitchell v. Rouse*, 19 App. Div. 561, 46 N. Y. Supp. 523. Contra, *Peake v. Bell*, 7 Hun, 454.

²⁷ *Slater v. Drescher*, 72 Hun, 425; *Steinau v. Scheuer*, 15 App. Div. 5, 8, 43 N. Y. Supp. 1112.

²⁸ *Davison v. Herring*, 24 App. Div. 402, 48 N. Y. Supp. 760.

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have been made when the order was granted; and either party may notice it for hearing at the appellate division, upon the exceptions."²⁹ It will be noticed that this provision applies only to a trial by jury,³⁰ though it is immaterial that the trial by jury is merely of issues arising in an action triable by the court.³¹ Where a "special" verdict is rendered, the trial judge cannot send the motion for judgment on such verdict, with the exceptions, to the appellate division to be heard there in the first instance.³²

Care should be taken to distinguish the procedure from that where a verdict is directed subject to the opinion of the appellate division which practice has been considered in a preceding volume.³³

A late case holds that the appellate term, in the first department, has no jurisdiction to entertain the motion.^{33a}

—**Exceptions only can be ordered heard.** It is exceptions only that can be sent in the first instance to the appellate division.³⁴

—**Necessity of verdict.** Prior to the amendment of 1882, the order could not be made unless a verdict had been rendered but now such an order is proper where the complaint has been dismissed or a nonsuit granted.³⁵

—**Discretion of trial judge.** Whether exceptions shall be so tried rests in the discretion of the trial judge.³⁶ It is only when the judge deems the exceptions taken by the unsuccessful party to be of sufficient importance that he will direct a

²⁹ Code Civ. Proc. § 1000.

³⁰ *MacNaughton v. Osgood*, 114 N. Y. 574.

³¹ Code Civ. Proc. § 1003. Issues in divorce suit. *Carpenter v. Carpenter*, 30 State Rep. 955, 9 N. Y. Supp. 583.

³² So held under the old Code. *Griswold v. Dexter*, 62 Barb. 648.

³³ Volume 2, p. 2288.

^{33a} *Dickson v. Manhattan Ry. Co.*, 91 N. Y. Supp. 36.

³⁴ *Post v. Hathorn*, 54 N. Y. 147; *Cronk v. Canfield*, 31 Barb. 171.

³⁵ *Lake v. Artisans' Bank*, 3 Abb. Dec. 10, 3 Abb. Pr. (N. S.) 209, 3 Keyes, 276.

³⁶ *Beattie v. Niagara Sav. Bank*, 41 How. Pr. 137. Objection to refusal cannot be first urged in the court of appeals. *Wyckoff v. De Graaf*, 98 N. Y. 134

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motion for a new trial to be first heard in the appellate division.³⁷

— **Obtaining hearing by stipulation.** The parties cannot stipulate for a hearing of exceptions in the first instance at the appellate division, so as to confer power on such court to hear the exceptions.³⁸

— **Power of county court.** A county court cannot order exceptions to be first heard in the appellate division.³⁹

— **Effect of prior hearing of exceptions at trial term.** Though the decisions are not entirely harmonious, yet the rule seems to be that if a motion for a new trial is made on the judge's minutes, on exceptions taken, and denied, the exceptions cannot thereafter be ordered to be heard in the first instance at the appellate division, though they may where the motion on the minutes was not founded on exceptions.⁴⁰

— **Ordering hearing.** If it is desired that judgment be suspended during the hearing of the exceptions, the order must provide therefor.⁴¹ An order suspending the entry of judgment may be afterwards modified at special term held by another judge by allowing judgment to be entered.⁴² The usual custom, where it is thought advisable that the prevailing party should have security on his verdict, is to permit him to enter judgment to stand as security only.⁴³ The order should not provide for service of a notice of appeal, since judgment being suspended until the hearing, there is nothing to appeal from.⁴⁴ A formal order must be entered.⁴⁵ An oral direction is insuffi-

³⁷ *Cobb v. Cornish*, 16 N. Y. 602; *Molony v. Dows*, 9 Abb. Pr. 86, 18 How. Pr. 27.

³⁸ *Pendleton v. Pendleton*, 1 T. & C. 95.

³⁹ *Boyd v. Cronkrite*, 10 Hun. 574.

⁴⁰ *Schram v. Werner*, 81 Hun. 561, 31 N. Y. Supp. 47, which reviews the decisions.

⁴¹ *Douglas v. Haberstro*, 10 Abb. N. C. 6.

⁴² *Long v. Stafford*, 103 N. Y. 274, 282.

⁴³ 2 Rumsey, Pr. (2d Ed.) 508.

⁴⁴ *Battersby v. Collier*, 34 App. Div. 347, 54 N. Y. Supp. 363.

⁴⁵ Under the old Code the rule was different. *Webster v. Cole*, 17 Hun. 507.

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cient.⁴⁶ But the minutes of the trial signed by the clerk, and containing a statement that defendant's exceptions are to be heard by the appellate division in the first instance, and entry of the judgment suspended in the meantime, constitute a part of the record, and are a sufficient certification of the entry of the necessary order for hearing the exceptions.⁴⁷

— **Form of order.**

[Title of action.]

At a trial term, etc.

The above action having duly come on for trial in its regular order on the calendar of this court, before Hon. ———, and a jury, at a trial term of this court held at the court house in the city of ———, on the ——— day of ———, 190—, and the jury having rendered a verdict on such trial in favor of ———, and the ——— having duly excepted to certain rulings made by said justice on said trial; Now, on motion of ———, attorney for ——— [and after hearing ——— in opposition thereto]:

Ordered, that the exceptions taken by ———, on the trial of this action, be, and the same hereby are, directed to be heard, in the first instance by the appellate division of the supreme court, and that the entry of judgment be, and the same is, hereby suspended until ———.⁴⁸

[Date.]

Enter: [signature of judge by initials
of name and title.]

— **Vacating order.** As already stated, the order may be revoked or modified, on notice, in court or out of court, by the judge who made it; or it may be set aside for irregularity, by the court, at any term thereof. But the provision that the order may be revoked or modified by the judge who made it does not preclude the power of a special term held by any judge to revoke or modify it.⁴⁹ The order may be vacated at special term, and permission given to move for a new trial upon a case and exceptions at special term.⁵⁰

⁴⁶ Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co., 6 App. Div. 567, 40 N. Y. Supp. 219.

⁴⁷ Sedgwick v. Macy, 24 App. Div. 1, 49 N. Y. Supp. 154.

⁴⁸ For another form, see Brooke v. Tradesmen's Nat. Bank, 68 Hun, 129, 22 N. Y. Supp. 633.

⁴⁹ Long v. Stafford, 103 N. Y. 274, 282.

⁵⁰ Post v. Hathorn, 54 N. Y. 147.

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— **Hearing.** The motion before the appellate division is an enumerated one to be brought on on eight days' notice after filing of note of issue.⁵¹ The moving party should prepare and serve the proper papers for argument and if he does not do so the opposing party is entitled to a denial of the motion by default.⁵² The hearing must be on a case and exceptions, or a bill of exceptions.

Only questions of law are reviewable,⁵³ i. e., the questions raised by the exceptions appearing on the record.⁵⁴ Questions of fact are concluded by the verdict, and hence the question as to whether the verdict is against the evidence or is excessive or inadequate cannot be reviewed.⁵⁵ So if a verdict has been directed and no exceptions taken, the sufficiency of the evidence to take the case to the jury cannot be considered.⁵⁶ The appellate division has power only to award a new trial or to direct a judgment on the verdict.⁵⁷

§ 1944. After interlocutory judgment.

The Code (§ 1001) provides as follows: "Where the decision or report, rendered upon the trial of an issue of fact by the court, without a jury, or by a referee, directs an interlocutory judgment to be entered, and further proceedings must be taken, before the court, or a judge thereof, or a referee, before a final judgment can be entered, a motion for a new trial, upon one or more exceptions, may be made at a term of the appellate division, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. The time within which the party must except, for that purpose, to a ruling of law made upon such

⁵¹ Rules 38 to 41 of General Rules of Practice.

⁵² *Staake v. Preble*, 6 State Rep. 763, 43 Hun, 441. See, also, Rule 41 of General Rules of Practice.

⁵³ *Hotchkins v. Hodge*, 38 Barb. 117; *Martin v. Platt*, 51 Hun, 429, 4 N. Y. Supp. 359.

⁵⁴ *Amy v. Stein*, 48 Super. Ct. (16 J. & S.) 512.

⁵⁵, ⁵⁶ *Curtis v. Wheeler & Wilson Mfg. Co.*, 141 N. Y. 511.

⁵⁷ *Purchase v. Matteson*, 25 N. Y. 211. It cannot dismiss the complaint on the merits. *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449.

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a trial, by the judge or the referee, after the close of the testimony, is ten days after service of a copy of the decision or report, and notice of the entry of the interlocutory judgment thereupon.⁵⁸ This section applies only to interlocutory as distinguished from final judgments.⁵⁹ Furthermore it applies only where the trial is without a jury.⁶⁰ It provides a remedy in place of an appeal from the interlocutory judgment.⁶¹ The interlocutory judgment cannot be reviewed by an appeal to the court of appeals,⁶² but the order of the appellate division may be so appealed.⁶³ The object of the Code provision is to facilitate proceedings and more particularly to save the labor and expense of a reference until the case can be reviewed by the appellate division on the questions, which, as decided, constitute the basis of a reference; and hence the motion should be made before a hearing of the reference.⁶⁴ The hearing is based on a case and exceptions which must be settled and signed by the trial judge.⁶⁵ Notice of a motion for a new trial should be given instead of notice of an appeal.⁶⁶ A note of issue should be filed with the clerk of the appellate division and the motion should be duly noticed for hearing. Such a motion does not stay proceedings under the interlocutory judgment,⁶⁷ and hence it may be necessary to obtain a stay of proceedings until the motion for a new trial is decided by the appellate division. Only questions of law

⁵⁸ Code Civ. Proc. § 1001.

⁵⁹ *Produce Bank v. Morton*, 67 N. Y. 199, 203.

⁶⁰ And a trial of an action for partition where questions of fact have been framed for the jury and a further hearing had at special term is not a trial without a jury. *Bowen v. Sweeney*, 142 N. Y. 349.

⁶¹ *Moore v. Oviatt*, 35 Hun, 216, 220. If notice of appeal instead of motion for a new trial has been given, the appellate division may permit it to be withdrawn. *Douglas v. Douglas*, 5 Hun, 140, 146. See, also, *Garczyski v. Russell*, 75 Hun, 512, 27 N. Y. Supp. 461.

⁶² *Raynor v. Raynor*, 94 N. Y. 248.

⁶³ *Townsend v. Van Buskirk*, 162 N. Y. 265.

⁶⁴ *Church v. Kidd*, 3 Hun, 254, 262; *Green v. Roworth*, 6 Misc. 130, 56 State Rep. 624, 26 N. Y. Supp. 37.

⁶⁵ *Green v. Roworth*, 4 Misc. 141, 23 N. Y. Supp. 777.

⁶⁶ *Douglas v. Douglas*, 5 Hun, 140, 145.

⁶⁷ *Bennett v. Austin*, 10 Hun, 451.

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arising on rulings duly excepted to are presented for review.⁶⁸ The appellate division is not bound to grant the motion though greater relief is allowed than the party is entitled to, but may deny it and direct a modification of the judgment so that it grant the proper measure of relief, and affirm it as modified.⁶⁹

ART. III. MOTION AT SPECIAL TERM.

§ 1945. Propriety.

A motion for a new trial "may" be made at special term on any ground on which a motion may be made on the judge's minutes. A motion for a new trial "must," in the first instance, be heard and decided at the special term where it is not provided for by either section 999, 1000, or 1001, of the Code.⁷⁰ In other words, a motion for a new trial on the ground that the verdict is against the evidence, contrary to law, excessive, or inadequate, may be made either on the minutes before the trial judge or at the special term.⁷¹ So, as will be stated more fully in a succeeding paragraph, a motion for a new trial of special issues submitted to a jury, may be made either on the judge's minutes or at special term. So a motion based on exceptions, where the trial was a jury trial, may be heard on the judge's minutes or at special term provided the exceptions have not been ordered heard by the appellate division in the first instance. But a motion on the ground of surprise or newly-discovered evidence "must" be made at special term,⁷² as must a motion on the ground of objectionable conduct on the part of a juror.⁷³

⁶⁸ *Raynor v. Raynor*, 94 N. Y. 248; *Dorchester v. Dorchester*, 121 N. Y. 156; *Toms v. Greenwood* 30 State Rep. 478, 9 N. Y. Supp. 666.

⁶⁹ *Fischer v. Blank*, 138 N. Y. 669.

⁷⁰ Code Civ. Proc. § 1902.

⁷¹ Error in rulings on question of law. *Hastings v. McKinley*, 3 Code R. 19. Improper communication with jury. *Elliott v. Luengene*, 17 Misc. 78, 39 N. Y. Supp. 850.

⁷² *Newhall v. Appleton*, 16 Super. Ct. (14 J. & S.) 6. But where motion on judge's minutes is denied, the trial judge may, after the term, grant an order to show cause why a rehearing should not be granted and also why a new trial should not be granted because of surprise and

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It has been held that the special term cannot hear a motion for a new trial while an order that the exceptions be heard in the first instance in the appellate division continues in force.⁷⁴ But a motion for a new trial on the ground that the verdict is against the evidence may be made after the hearing of exceptions in the appellate division.⁷⁵ And where, instead of accepting the privilege granted to move at the appellate division, a motion for a new trial on the exceptions is made and decided at a special term, the latter will treat the direction to have exceptions heard at the appellate division in the first instance, as waived, and the decision made at special term as the decision of the judge who tried the cause, whether it was so in fact or not.⁷⁶

The denial of a motion for a new trial on the minutes does not preclude a subsequent motion at special term, on different grounds, based on a case and exceptions, though it would seem to preclude a subsequent motion at special term where based on the same grounds.⁷⁷ Thus, a new trial on the ground of error and manifest injustice cannot be granted on motion by a judge other than the one who tried the cause, after the trial judge has denied a motion on his minutes.⁷⁸ But where specific issues have been tried by a jury and a motion for a new trial on the minutes has been made and denied, this will not preclude the party from again moving for a new trial on a case and exceptions when application is made at special term for final judgment.⁷⁹

newly-discovered evidence. *Croner v. Farmers' F. Ins. Co.*, 18 App. Div. 263, 46 N. Y. Supp. 108.

⁷³ *Paulitsch v. New York Cent. & H. R. R. Co.*, 50 Super. Ct. (18 J. & S.) 241; *Moore v. New York El. R. Co.*, 24 Abb. N. C. 77, 18 Civ. Proc. R. (Browne) 146, 29 State Rep. 146, 8 N. Y. Supp. 329, 15 Daly, 506.

⁷⁴ *Price v. Keyes*, 1 Hun, 177, 3 T. & C. 720.

⁷⁵ *Martin v. Platt*, 53 Hun, 42.

⁷⁶ *Ely v. McNight*, 30 How. Pr. 97.

⁷⁷ See *Wiley v. Rooney*, 41 State Rep. 444, 16 N. Y. Supp. 471; *Herzberg v. Murray*, 40 Super. Ct. (8 J. & S.) 271; *Schmidt v. Cohn*, 12 Daly, 134.

⁷⁸ *Reich v. McCrea*, 26 State Rep. 926, 7 N. Y. Supp. 600.

⁷⁹ *Anderson v. Carter*, 24 App. Div. 462, 49 N. Y. Supp. 255.

§ 1946. Before whom to move.

If the motion is founded on an allegation of error in a finding of fact or ruling on the law, it cannot be heard at a special term held by another judge unless the judge who presided at the trial is dead or his term of office has expired, or he is disqualified for any reason, or he specifically directs the motion to be heard before another judge.⁸⁰ A motion for a new trial on the merits cannot be made to a judge out of court even in the first judicial district.⁸¹

§ 1947. Time for motion.

Under the old practice, a motion for a new trial could not be made after judgment was entered except in case of an excusable mistake in practice, but under the present practice the motion may be made even after the entry of judgment.⁸² The Code provides that a subsequent motion for a new trial is not prejudiced by the entry, collection, or other enforcement of the judgment.⁸³ Thus, the entry of judgment by a plaintiff on a verdict in his favor does not estop him from moving for a new trial for inadequacy of damages.⁸⁴ It should be noticed, however, that the Code further provides that a motion for a new trial at special term, where it is founded upon an allegation of error in a finding of fact or ruling upon the law, made by the judge on the trial, cannot be made unless notice⁸⁵ therefor be given before the expiration of the time within

⁸⁰ Code Civ. Proc. § 1602. See, also, *Plunkett v. Appleton*, 41 Super. Ct. (9 J. & S.) 159; *Tunstall v. Winton*, 31 Hun, 222; *Smith v. Lidgerwood Mfg. Co.*, 40 App. Div. 467, 69 N. Y. Supp. 975.

⁸¹ Code Civ. Proc. § 770.

⁸² *Tracey v. Altmeyer*, 46 N. Y. 598.

⁸³ Code Civ. Proc. § 1605. Judgment and abandoned appeal does not preclude right to a new trial. *Donnelly v. McArdle*, 14 App. Div. 217, 77 State Rep. 560, 43 N. Y. Supp. 560.

⁸⁴ *Smith v. Dittman*, 34 State Rep. 303, 16 Daly, 427, 11 N. Y. Supp. 759.

⁸⁵ Service of an order staying proceedings for the purpose of making a case and exceptions on which to move for a new trial and service of the case and exceptions constitute sufficient notice. *Russell v. Agricultural Ins. Co.*, 19 App. Div. 625, 46 N. Y. Supp. 186.

Art. III. Motion at Special Term.—Time for Motion.

which an appeal can be taken from the judgment.⁸⁶ But a motion for a new trial on account of the misconduct of a juror is not founded "on an allegation of error in a finding of fact or ruling upon the law" on the trial,⁸⁷ nor is a motion based on the refusal to postpone the trial.⁸⁸ Furthermore, the objection that a motion is not made before the expiration of the time within which an appeal can be taken is waived by an admission of due and timely service of the notice of motion.⁸⁹

Irrespective of statute, however, a motion at special term should be made at the earliest practicable moment especially where the motion is based on surprise or newly-discovered evidence. If the motion is based on newly-discovered evidence it should be made at the next term after the evidence is discovered. Laches often prevents the granting of a new trial because of newly-discovered evidence,⁹⁰ as where eight years elapsed after the facts were known before the motion was made,⁹¹ or the counsel had knowledge of the new evidence for more than three years.⁹² Laches in moving for a new trial may, however, be excused in the moving affidavits.⁹³

Ordinarily, a party cannot move for a new trial on a case and exceptions after the judgment has been affirmed on appeal,⁹⁴ but a new trial for newly-discovered evidence may be ordered even after the case has been to the court of appeals

⁸⁶ Code Civ. Proc. § 1002. This rule does not, however, apply to special proceedings. *Baumann v. Moseley*, 63 Hun, 492, 45 State Rep. 344, 18 N. Y. Supp. 563.

⁸⁷ *Fleischmann v. Samuel*, 18 App. Div. 97, 79 State Rep. 404, 45 N. Y. Supp. 404.

⁸⁸ *Smith v. Lidgerwood Mfg. Co.*, 60 App. Div. 467, 69 N. Y. Supp. 975.

⁸⁹ *Byrnes v. Palmer*, 18 App. Div. 1, 45 N. Y. Supp. 479.

⁹⁰ *Hollingsworth v. Napier*, 3 Caines, 182; *Kepner v. Betz*, 51 Super. Ct. (19 J. & S.) 18; *Fisher v. Corwin*, 35 Hun, 253.

⁹¹ *Evans v. United States L. Ins. Co.*, 21 Abb. N. C. 315, 12 State Rep. 635.

⁹² *Bath Gas Light Co. v. Claffy*, 18 App. Div. 155, 79 State Rep. 433, 45 N. Y. Supp. 433.

⁹³ *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. 7.

⁹⁴ *Conable v. Smith*, 46 State Rep. 2, 19 N. Y. Supp. 446; *Christ v. Chetwood*, 6 Misc. 619, 55 State Rep. 776, 26 N. Y. Supp. 80.

and disposed of there.⁹⁵ The fact that an appeal was taken and the judgment affirmed before moving for a new trial will not make its allowance improper if justice demands a new trial.⁹⁶ But a motion for a new trial on the ground of newly-discovered evidence will not be granted after an appeal has been taken and a decision rendered against the moving party, where the moving party knew of such evidence when he appealed from a judgment directing a verdict for the opposing party on the ground of the insufficiency of the evidence.⁹⁷ And a party is not guilty of laches in not making a motion for a new trial on the ground of newly-discovered evidence until after the decision of the court of appeals, where he got his information after a verdict against him at trial term had been reversed and the plaintiff instead of accepting a new trial appealed to the court of appeals.⁹⁸ But a judgment of the court of appeals giving judgment absolute upon the usual stipulation on an appeal from an order of the appellate division granting a new trial, precludes a subsequent motion for a new trial on the ground of newly-discovered evidence, and equally precludes a motion by an assignee of the cause of action to be substituted as plaintiff, for the purpose of making such motion.⁹⁹

Of course, the motion is premature if made before the rendition of the verdict.¹⁰⁰

§ 1948. Motion papers.

The motion must be based on a case unless it is based on the ground of irregularity or surprise.¹⁰¹ In the latter case, since the error does not appear in the record, the matter can

⁹⁵ *Nugent v. Metropolitan St. R. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476; *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274.

⁹⁶ *Keister v. Rankin*, 34 App. Div. 288, 54 N. Y. Supp. 274.

⁹⁷ *Biddescomb v. Cameron*, 58 App. Div. 42, 68 N. Y. Supp. 568.

⁹⁸ *Smith v. Matthews*, 21 Misc. 150, 47 N. Y. Supp. 96.

⁹⁹ *Evans v. United States L. Ins. Co.*, 21 Abb. N. C. 315, 12 State Rep. 635.

¹⁰⁰ See *Putnam v. Crombie*, 34 Barb. 232.

¹⁰¹ Code Civ. Proc. § 998. See, also, ante, § 1909.

 Art. III. Motion at Special Term.—Motion Papers.

be brought before the special term only by affidavits,¹⁰² though it is proper and wise to also prepare and serve a case where the motion is before a judge other than the trial judge and the determination of the motion may be influenced or affected by matters appearing in the record.¹⁰³ A motion for a new trial on the ground of newly-discovered evidence must be based on a case,¹⁰⁴ as must a motion based on error in the reception of evidence or granting a nonsuit,¹⁰⁵ or on the grounds that the judge received evidence prematurely or refused to submit to the jury a question of fact proper for their determination.¹⁰⁶

If a party intends to move for a new trial and a person, whose affidavit is necessary, refuses to make it, the court may appoint a referee to take such affidavit or deposition on proper application therefor being made.¹⁰⁷

—Where ground is newly-discovered evidence. In addition to a case, the affidavits of the witnesses who are expected to give the new testimony must be presented, or else the reason must be stated why such affidavits are not produced.¹⁰⁸ Such affidavits must set forth the readiness of the witnesses to swear to the facts claimed to be newly discovered.¹⁰⁹ An affidavit which merely states that the newly-discovered witness has "told" the party the facts relied on is not sufficient.¹¹⁰ The affidavit of the moving party should be presented which

¹⁰² *Haake v. Reynolds*, 23 Wkly. Dig. 562.

¹⁰³ See *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. 141.

¹⁰⁴ *Anon.*, 7 Wend. 331; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. 71; *Holmes v. Evans*, 37 State Rep. 369, 13 N. Y. Supp. 610, 59 Super. Ct. (27 J. & S.) 121. Motion will not be heard on affidavits only, unless by consent. *Boyd v. Boyd*, 11 Misc. 357, 32 N. Y. Supp. 295. Appellate court will not reverse, however, because of want of case where no objection was made at special term. *Russell v. Randall*, 123 N. Y. 436.

¹⁰⁵, ¹⁰⁶ *Craig v. Fanning*, 6 How. Pr. 336.

¹⁰⁷ *O'Connor v. McLaughlin*, 80 App. Div. 305, 80 N. Y. Supp. 741.

¹⁰⁸ *Matter of Cohen*, 84 Hun. 586, 32 N. Y. Supp. 851.

¹⁰⁹ *Armstrong Mfg. Co. v. Thompson*, 88 N. Y. Supp. 151; *Seaman v. Clarke*, 75 App. Div. 345, 78 N. Y. Supp. 171; *Adams v. Bush*, 1 Abb. Dec. 7, 2 Abb. Pr. (N. S.) 104; *Denny v. Blumerthal*, 8 Misc. 544, 59 State Rep. 263, 28 N. Y. Supp. 744.

¹¹⁰ *Shumway v. Fowler*, 4 Johns. 425.

affidavit should clearly state the facts necessary to bring the case within the rules already laid down as to newly-discovered evidence.¹¹¹ Thus, the motion papers must show, *inter alia*, that the evidence will probably change the result.¹¹² The new evidence must be stated or some good reasons shown for its omission.¹¹³ A statement that the witnesses "will corroborate and substantiate" testimony given by a witness at the trial is insufficient.¹¹⁴ In case of the death of a newly-discovered witness, documentary or other proof, corroborating or establishing what it is alleged could have been shown by him, is necessary.¹¹⁵

The motion cannot be opposed by counter-affidavits showing that the witness is unworthy of credit,¹¹⁶ though a new trial will not be granted where the newly-discovered evidence is met by a prior contradictory affidavit of the proposed witness,¹¹⁷ nor where the proposed evidence is highly improbable.¹¹⁸ And it would seem that if the moving affidavit states that the new witness is a man of good character, counter affidavits in regard thereto are admissible.¹¹⁹

— **Where ground is surprise.** No case is required. The affidavits should set forth the facts showing the surprise and the prejudicial effect thereof. The affidavit of the moving party must show that he has used reasonable diligence in making his motion.¹²⁰ If the motion is based on surprise in the

¹¹¹ See ante, § 1939.

¹¹² *White Corbin & Co. v. Jones*, 86 Hun. 57, 68 State Rep. 48, 34 N. Y. Supp. 203.

¹¹³ *Hollingsworth v. Napier*, 3 Caines, 182; *Russell v. Randall*, 30 State Rep. 452, 9 N. Y. Supp. 327.

¹¹⁴ *Matter of Cohen*, 84 Hun. 586, 32 N. Y. Supp. 851.

¹¹⁵ *Gould v. Moore*, 40 Super. Ct. (5 J. & S.) 387.

¹¹⁶ *Peyser v. Coney Island & B. R. Co.*, 81 Hun. 70, 77, 30 N. Y. Supp. 610; *Hagen v. New York Cent. & H. R. R. Co.*, 44 Misc. 540, 90 N. Y. Supp. 125. *Contra*, *Fleming v. Hollenback*, 7 Barb. 271; *Williams v. Baldwin*, 18 John. 489.

¹¹⁷ *Schultz v. Third Ave. R. Co.*, 47 Super. Ct. (15 J. & S.) 285.

¹¹⁸ *Cameron v. Leonard*, 17 App. Div. 127, 45 N. Y. Supp. 155.

¹¹⁹ *Pomroy v. Columbian Ins. Co.*, 2 Caines, 260, *Colem. & C. Cas.* 408.

¹²⁰ *Snowhill v. Knapp*, 7 N. Y. Leg. Obs. 15; *Peck v. Hiler*, 30 Barb.

testimony of one's own witness, the party must produce affidavits of other persons showing that he can make out a different case by them.¹²¹ If the surprise consists in the absence of a witness, the facts to which he would testify must be stated. A new trial will not be granted where the motion is based on the affidavit of a witness in effect contradicting his testimony on the first trial.¹²²

— **Where ground is irregularity—Affidavits of jurors.** A case is not necessary. Affidavits of jurors are admissible to "sustain" their verdict,¹²³ as by showing that the moving party was not prejudiced by the conduct of the jurors in visiting the locus in quo,¹²⁴ but not to impeach it, either for error or mistake in respect to the merits, or for irregularity or misconduct of themselves or their fellows;¹²⁵ though their affidavits may be used to show improper conduct of others.¹²⁶ Admissions or statements made by a juror are incompetent to impeach a verdict, though proven by the affidavits of third persons.¹²⁷ The affidavits of jurors cannot be used to show that they misunderstood the charge,¹²⁸ or mistake committed by them in making up their verdict where the mistake does not arise from circumstances occurring at the trial,¹²⁹ or to

¹²¹ *Phenix v. Baldwin*, 14 Wend. 62.

¹²² *Sims v. Sims*, 12 Hun, 231. See, also, *Perkins v. Brainerd Quarry Co.*, 11 Misc. 328, 32 N. Y. Supp. 230.

¹²³ *Dana v. Tucker*, 4 Johns. 487; *Nesmith v. Clinton F. Ins. Co.*, 8 Abb. Pr. 141.

¹²⁴ *Moore v. New York El. R. Co.*, 24 Abb. N. C. 77, 18 Civ. Proc. R. (Browne) 146, 29 State Rep. 146, 8 N. Y. Supp. 329, 15 Daly, 506.

¹²⁵ *Clum v. Smith*, 5 Hill, 560; *Haight v. City of Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193. The rule does not apply, however, to a body of men substituted in the place of a jury. *Canal Bank of Albany v. City of Albany*, 9 Wend. 244, 254.

¹²⁶ Improper conduct of successful party. *Reynolds v. Champlain Transp. Co.*, 9 How. Pr. 7; *Thomas v. Chapman*, 45 Barb. 98. Misconduct of officer in charge of jury. *Thomas v. Chapman*, 45 Barb. 98.

¹²⁷ *Ayres v. Village of Hammondsport*, 13 Civ. Proc. R. (Browne) 236, 11 State Rep. 706; *Clum v. Smith*, 5 Hill, 560.

¹²⁸ *White Corbin & Co. v. Jones*, 86 Hun, 57, 68 State Rep. 48, 34 N. Y. Supp. 203.

¹²⁹ *Ex parte Caykendoll*, 6 Cow. 53.

explain the grounds of their verdict or to show that they intended something different from what they found,¹³⁰ or to show that they allowed improper damages,¹³¹ or that one juror was so deaf that he did not hear the evidence or charge,¹³² or that on account of mistaking the facts the jury wrongly computed the amount,¹³³ or that the amount of the verdict was merely intended to be allowed on account and that the true verdict should have been for a different sum.¹³⁴ So such affidavits will not be received to show that the manner in which they agreed on a verdict was improper,¹³⁵ or the extent and character of their private deliberations,¹³⁶ or that they agreed to the verdict contrary to their convictions in order to secure their discharge,¹³⁷ or that the jury did not take into consideration every question raised on the trial.¹³⁸

But while affidavits of jurors will not be received to impeach their verdict, yet such affidavits may be used to correct a verdict where there has been an evident error and misunderstanding resulting in a miscarriage of justice,¹³⁹ or to show that certain damages were allowed as a part of their verdict,¹⁴⁰ or that the verdict was erroneously stated to the court or entered by its clerk,¹⁴¹ or to show what the jury intended where the special findings of the jury are inconsistent with the general verdict rendered.¹⁴²

¹³⁰ *People v. Columbla Common Pleas*, 1 Wend. 297.

¹³¹ *Brownell v. McEwen*, 5 Denio, 367.

¹³² *Messenger v. Fourth Nat. Bank*, 6 Daly, 190.

¹³³ *Kelly v. Sheehy*, 8 Daly, 29.

¹³⁴ *Dean v. City of New York*, 29 App. Div. 350, 51 N. Y. Supp. 586, 5 Ann. Cas. 351.

¹³⁵ *Dana v. Tucker*, 4 Johns. 487.

¹³⁶ *Dayton v. Church*, 7 Abb. N. C. 367.

¹³⁷ *Wiggins v. Downer*, 67 How. Pr. 65.

¹³⁸ *Perkins v. Brainerd Quarry Co.*, 11 Misc. 328, 65 State Rep. 410, 22 N. Y. Supp. 230; *Castle v. Greenwich F. Ins. Co.*, 45 N. Y. Supp. 901, 79 State Rep. 901.

¹³⁹ *Webber v. Reynolds*, 32 App. Div. 248, 52 N. Y. Supp. 1007.

¹⁴⁰ *Sargent v. —*, 5 Cow. 106.

¹⁴¹ *Dayton v. Church*, 7 Abb. N. C. 367.

¹⁴² *Kennedy v. Ball & Wood Co.*, 91 Hun, 197, 71 State Rep. 126, 36 N. Y. Supp. 325.

Art. IV. After Trial of Specific Issues.—A. By Jury.

§ 1949. Hearing.

On a motion for a new trial at special term, a reference may be ordered to determine and report on the questions of fact arising on the affidavits used on the motion.¹⁴³ The court will not in general examine rulings made at the trial in favor of the party against whom the verdict was rendered.¹⁴⁴ On a motion to set aside a verdict as not warranted by the evidence, the court will not receive evidence to supply the defect of proof,¹⁴⁵ though the record of a judgment which was not regularly read at the trial has been allowed to be produced.¹⁴⁶ And where the motion is based on exceptions to the admission of evidence against the objection that it was not properly authenticated, the court may consider a properly authenticated copy of the writings which is produced on the hearing.¹⁴⁷

ART. IV. MOTION AFTER TRIAL OF SPECIFIC QUESTIONS IN AN EQUITY ACTION.

A. TRIAL BY JURY.

§ 1950. Code provision.

The Code provides that the provisions of the Code article "relating to the proceedings to review a trial by a jury are applicable to the trial, by a jury, of one or more specific questions of fact, arising on the issues, in an action triable by the court. If the trial of the issues by a jury is a matter of discretion and not of right,¹⁴⁸ a new trial may be granted, as to some of the questions so tried, and refused as to the others; and an error, in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disre-

¹⁴³ *Nugent v. Metropolitan St. R. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476.

¹⁴⁴ *Elsev v. Metcalf*, 1 Denio, 323.

¹⁴⁵ *Watson v. Delafield*, 2 Caines, 224.

¹⁴⁶ *High v. Wilson*, 2 Johns. 46; *Armstrong v. Percy*, 5 Wend. 535. See, also, *Ritchie v. Putnam*, 13 Wend. 524.

¹⁴⁷ *Dresser v. Brooks*, 3 Barb. 429.

¹⁴⁸ See vol. 2, §§ 1650, 1651, as to when trial by jury is matter of right and when matter of discretion.

garded; if that court is of opinion that substantial justice does not require that a new trial should be granted. Where the judge, who presided at the trial, neither entertains a motion for a new trial, nor directs exceptions taken at the trial, to be heard at a term of the appellate division of the supreme court, a motion for a new trial can be made only at the term where the motion for final judgment is made, or the remaining issues of fact are tried, as the case requires.¹⁴⁹ The last clause is designed to prevent an indirect appeal from one judge to another, on a motion for a new trial, except in a case where that course cannot be avoided; as where the application for judgment is made, or the remaining issues are tried, at a term held by a judge other than the one who presided at the jury trial.¹⁵⁰ The Code provision does not, it seems, apply to a trial before a referee,¹⁵¹ nor to exceptions taken on the trial of a common-law action but only to cases in equity where issues have been framed.¹⁵² The effect of the provision seems to be to allow a motion for a new trial on any ground warranting such a motion where the trial is of a common-law action by a jury.

§ 1951. General Rules of Practice.

The General Rules of Practice provide that when any specific question of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury as a substitute for a feigned issue, and has been tried, either party may apply for a new trial at special term on a case and exceptions on the ground of any error of the judge or on the ground that the verdict is against evidence, except when the judge directs such motion to be made on his minutes at the same term of court at which the issues are tried.¹⁵³

¹⁴⁹ Code Civ. Proc. § 1003; *Clark v. Brooks*, 2 Abb. Pr. (N. S.) 385; *Marvin v. Marvin*, 5 T. & C. 429, note; *Post v. Mason*, 91 N. Y. 539.

¹⁵⁰ *Anderson v. Carter*, 24 App. Div. 462, 466, 49 N. Y. Supp. 255.

¹⁵¹ *Smith v. Lapham*, 87 N. Y. 631.

¹⁵² *Macher v. Lamar Ins. Co.*, 2 Civ. Proc. R. (Browne) 28.

¹⁵³ Rule 31 of General Rules of Practice.

§ 1952. Application.

Formerly the application for a new trial of issues in an equity case sent to a jury for trial was made to the court which sent them. Now, as provided for by the Code, the motion may be made on the minutes of the presiding judge or at special term, or exceptions may be ordered to be heard in the first instance by the appellate division. The more usual practice, however, is to decline to grant a new trial on the minutes but to leave the motion to be made at the term when the motion for final judgment is made, or the remaining issues of fact tried, on a case and exceptions.¹⁵⁴ There would seem to be no necessity for making a second motion for a new trial, especially in a case where no other evidence is offered by either party bearing on the special issues tried, but it is proper and may be advisable to do so; a motion may be made at special term on a case and exceptions, on the application for final judgment, notwithstanding the judge who presided at the jury trial heard and denied a motion for a new trial on his minutes.¹⁵⁵ The motion must be made before judgment is granted.¹⁵⁶

§ 1953. Hearing.

A new trial will not be granted even though some erroneous decisions have been made if on the whole case the verdict seems to be right.¹⁵⁷ In other words, the verdict should not be disturbed, unless it appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result.¹⁵⁸

¹⁵⁴ *Jones v. Stewart*, 7 Civ. Proc. R. (Browne) 164, 168.

¹⁵⁵ *Anderson v. Carter*, 24 App. Div. 462, 466, 468, 49 N. Y. Supp. 255.

¹⁵⁶ Code Civ. Proc. § 1005, does not apply. *Chapin v. Thompson*, 80 N. Y. 275.

¹⁵⁷ *Lansing v. Russell*, 13 Barb. 510, 520.

¹⁵⁸ *Van Tuyl v. Van Tuyl*, 8 Abb. Pr. (N. S.) 5, 57 Barb. 235; *Forrest v. Forrest*, 25 N. Y. 501; *Whitney v. Whitney*, 76 Hun, 585, 58 State Rep. 272, 28 N. Y. Supp. 214.

§ 1954. Appeal.

A separate appeal from an order granting or refusing a new trial "on the merits" is prohibited.¹⁵⁹ But the Code provision does not prevent an appeal from the judgment with notice of an intention to review the order denying the motion for a new trial so as to bring questions of fact before the appellate court.¹⁶⁰

B. TRIAL BY REFEREE.

§ 1955. Code provisions.

The Code provides as follows: "In an action triable by the court, where a reference has been made, to report upon one or more specific questions of fact, involved in the issue, a motion for a new hearing may be made at a special term at any time before the hearing of a motion for final judgment, or the trial of the remaining issues of fact. The motion must be made upon affidavits, unless the court, or a judge thereof, directs a case to be prepared and settled."¹⁶¹ Rule 31 of the General Rules of Practice is in conflict with this Code provision inasmuch as that rule provides that the motion must be made on a case and exceptions. It will be noticed that this Code provision applies only to a reference "to report on one or more specific questions of fact," and hence a new trial cannot be obtained thereunder where all the issues have been sent to a referee to hear and determine.¹⁶²

The Code also provides that where a reference directed as prescribed in either section 1015 or section 1215 of the Code (where reference is to take an account and report, or to report on facts not arising on the issues, or where reference is to aid the court in entering a default judgment) has been executed, either party may apply for an order directing a new hearing on proof by affidavit that error was committed, to his prejudice, on the hearing or in the report. In a proper case, the

¹⁵⁹ Code Civ. Proc. § 1347, subd. 2.

¹⁶⁰ *Anderson v. Carter*, 24 App. Div. 462, 468, 49 N. Y. Supp. 255.

¹⁶¹ Code Civ. Proc. § 1004.

¹⁶² *Garbutt v. Garbutt*, 4 State Rep. 416.

ART. V. Order.

application may be granted, after judgment has been entered. In that case, the judgment may be set aside, either then or after the new hearing, as justice requires.¹⁶³

ART. V. ORDER.

§ 1956. Necessity, form, and contents.

A new trial may be granted as to one or more co-parties where the verdict is proper as to a part but not as to all the co-parties,¹⁶⁴ and if the issues are distinct a new trial may be granted as to a part of the issues.¹⁶⁵ But the trial judge cannot dismiss the complaint where a verdict has been rendered.¹⁶⁶ If a new trial is granted, the court may direct and enforce restitution the same as where a judgment is reversed on appeal.¹⁶⁷

The order denying a motion for a new trial, made at the conclusion of the trial, must be in writing and formally entered, in order to authorize a review of the verdict.¹⁶⁸ And the absence of an order denying a new trial is not supplied by the motion itself nor by a notice of appeal which states that the appeal is taken not only from the judgment but also from the order,¹⁶⁹ nor by the fact that the denial of the motion appears on the minutes of the court.¹⁷⁰

When an order grants or refuses a new trial, except on the exceptions taken during the trial, it shall specify the grounds upon which the motion was made and the ground or grounds

¹⁶³ Code Civ. Proc. § 1232.

¹⁶⁴ *People v. New York Common Pleas*, 19 Wend. 118; *Gerald v. Quam*, 10 Abb. N. C. 28.

¹⁶⁵ So held in a partition suit. *Lavelle v. Corrignio*, 86 Hun, 135, 67 State Rep. 122, 33 N. Y. Supp. 376. See Code Civ. Proc. § 1003.

¹⁶⁶ *Ives v. Jacobs*, 2 N. Y. Supp. 730, 18 State Rep. 1011.

¹⁶⁷ Code Civ. Proc. § 1005.

¹⁶⁸ *Maas v. Ellis*, 12 Civ. Proc. R. (Browne) 323; *May v. Menton*, 79 State Rep. 1047, 20 Misc. 723, 45 N. Y. Supp. 1047.

¹⁶⁹ *Richardson v. Hartmann*, 68 Hun, 9; *Swart v. Rickard*, 148 N. Y. 264.

¹⁷⁰ *Ringle v. Wallis Iron Works*, 85 Hun, 279. See, also, *Swart v. Rickard*, 148 N. Y. 264.

upon which it was granted.¹⁷¹ If the order does not recite the grounds on which the motion was made, the appeal raises no question "of fact" for review.¹⁷²

The order is usually drawn up by the prevailing party pursuant to the decision of the court. Such party should have the order entered by the clerk and then serve a copy, with notice of its entry, on his opponent.

Where a motion made on the minutes is granted unless plaintiff consents to a reduction of the verdict, and plaintiff refuses to consent but appeals from the order which is reversed by the appellate division, and judgment directed on the verdict, the defendant is not thereafter entitled to enter an order denying his motion for a new trial.¹⁷³ An order granting a new trial on the judge's minutes, where the trial judge has no jurisdiction to hear the motion, may be vacated at special term though an appeal from the order is pending.¹⁷⁴

— Form of order denying motion on the minutes.

[Title of cause.]

At a trial term, etc.

Present, Hon. ———, Justice.

The jury in this case having rendered a verdict in favor of defendant, and plaintiff having thereupon moved the judge, presiding at the trial, on his minutes, to set aside the verdict and grant a new trial on the exceptions taken on the trial, and on the following grounds, viz.: [Because the verdict was contrary to the evidence and contrary to law.]

It is ordered that said motion be and the same is hereby denied with ten dollars costs.

[And it is further ordered that after taxation of costs, entry of judgment, and service of a copy of the judgment and notice of entry of same, all proceedings on the part of the plaintiff be stayed for ——— days and that the defendant have ——— days from the date of said trial in which to make and serve a case and exceptions herein.]

¹⁷¹ Rule 31 of General Rules of Practice; *Pharis v. Gere*, 107 N. Y. 231; *Murphy v. Interurban St. R. Co.*, 88 N. Y. Supp. 187.

¹⁷² *Buffalo Ice Co. v. Cook*, 9 Misc. 434, 29 N. Y. Supp. 1057.

¹⁷³ *Sidmonds v. Brooklyn Heights R. Co.*, 75 App. Div. 295, 78 N. Y. Supp. 129.

¹⁷⁴ *First Nat. Bank of Union Mills v. Clark*, 3 State Rep. 438.

Art. V. Order.—Necessity, Form, and Contents.

— Form of order at special term.

[Title of court and cause.]

At a special term, etc.

A motion for a new trial on the part of the ——— herein, having been made [on the case], and on reading and filing the affidavit of ——— in support of said motion, and the affidavit of ——— in opposition thereto; and after hearing ———, attorney for ———, in support of the motion, and ———, attorney for ———, in opposition thereto:

Ordered that the said motion for a new trial be and the same is hereby granted [or "denied"] with ——— dollars costs [or "with costs to abide the event"], on condition that ———.

— Form of order of appellate division denying exceptions.

Present:

Hon. ———,

Presiding justice.

Hon. ———,

Hon. ———,

Associate justices.

At a term of the appellate division of the supreme court of the state of New York, in and for the ——— judicial department, held at the court house in the city of ———, on the ——— day of ———, 190—.

[Title of cause.]

The exceptions of the ——— in the above-entitled cause having been duly brought to argument before this court, now, after hearing ———, of counsel for ———, and ———, of counsel for ———:

Ordered that the exceptions of ——— be, and the same hereby are, overruled, and that the plaintiff have judgment on the verdict in this action, with costs.

_____,
Clerk.

§ 1957. Imposing conditions.

Where the granting of the motion is a matter of right, as where the motion is based on exceptions,¹⁷⁵ the order should not impose any conditions, and motion costs should abide the event.¹⁷⁶ When a verdict is set aside in the "discretion" of

¹⁷⁵ Brauer v. Oceanic Steam Nav. Co., 66 App. Div. 605, 73 N. Y. Supp. 291.

¹⁷⁶ Smith v. City of New York, 55 App. Div. 90, 66 N. Y. Supp. 1046. See, also, Lough v. Romaine, 36 Super. Ct. (4 J. & S.) 332. Where there is no question upon the evidence, but the verdict is contrary to the charge of the judge and to the law, the costs, on granting a new trial, will be directed to abide the event of the suit. Van Rensselaer v. Dole, 1 Johns. Cas. 279; Knapp v. Curtis, 9 Wend. 60.

the court, it ought ordinarily to be on payment of the costs of the trial by the party in whose favor the discretion is exercised.¹⁷⁷ Thus, if the error complained of is the error of the jury, the party asking the favor should be required to pay the costs of the trial.¹⁷⁸ So an order granting a new trial because the verdict is contrary to the evidence should be conditioned on the payment by the moving party of the costs of trial and disbursements.¹⁷⁹ And on granting a new trial because of the inadequacy of the amount of plaintiff's verdict, the imposition of the payment of defendant's costs and disbursements, including the amount paid for a copy of the stenographer's minutes, has been held proper.¹⁸⁰ But while the party entitled to relief against a verdict not supported by the evidence should be required to pay the costs of opposing the motion for setting it aside and the costs of the trial including witness fees and disbursements, he should not be compelled to pay all the costs of the action.¹⁸¹ Only costs and disbursements after the notice of trial should be ordered paid.¹⁸² An order granting a new trial upon the condition of the payment of costs should contain a provision that if the costs are not paid the motion is denied with costs.¹⁸³ The amount of costs which may be taxed on a motion "on a case" are "the same sums as on an appeal."¹⁸⁴

Other conditions may also be imposed. On granting a motion to set aside a verdict as against the weight of evidence,

¹⁷⁷ *Mahar v. Simmons*, 47 Hun. 479.

¹⁷⁸ *Lawrence v. Wilson*, 86 App. Div. 472, 83 N. Y. Supp. 821; *Helgers v. Staten Island Midland R. Co.*, 69 App. Div. 570, 75 N. Y. Supp. 34, 10 Ann. Cas. 420; *Sloane v. McCauley*, 33 Misc. 652, 68 N. Y. Supp. 187.

¹⁷⁹ *Murphy v. Interurban St. R. Co.*, 88 N. Y. Supp. 187; *Jackson v. Thurston*, 3 Cow. 342; *Silverman v. Dry Dock, E. B. & B. R. Co.*, 69 App. Div. 22, 74 N. Y. Supp. 481. In the third department, however, it is held that it is not a matter of right that costs be imposed as a condition of granting a new trial on the ground that the verdict is against the evidence. *People v. Glasgow*, 30 App. Div. 94, 52 N. Y. Supp. 24.

¹⁸⁰ *Riegelman v. Brunnings*, 36 App. Div. 351, 56 N. Y. Supp. 755.

¹⁸¹ *Buck v. Webb*, 58 Hun. 185.

¹⁸² *Fleischman v. Yagel*, 16 Misc. 511, 38 N. Y. Supp. 523.

¹⁸³ *Young v. Stone*, 77 Hun. 395, 69 State Rep. 419, 28 N. Y. Supp. 881.

¹⁸⁴ See post, chapter on costs.

ART. V. Order — Imposing Conditions.

it has been held proper to compel defendant to stipulate not to tax costs on a final recovery, and that if plaintiff finally recovers, entire costs should be taxed in his favor.¹⁸⁵ If newly-discovered evidence will show that one of the applicant's witnesses on the former trial was mistaken the new trial should not be granted, unless the party applying stipulates that the testimony of the witness on the former trial shall be read as part of his evidence upon the new trial, or that such witness shall be called by him upon the new trial.¹⁸⁶ It has been held allowable to impose the condition that the action shall not abate in case of the death of the applicant.¹⁸⁷ But on ordering a new trial because of newly-discovered evidence, it is not proper to require as a condition that defendant execute a stipulation admitting his negligence and plaintiff's freedom therefrom.¹⁸⁸ And the court will not compel defendant to bring the amount of the verdict into court.¹⁸⁹ So the court at special term has no power, upon a motion for a new trial, to annex to an order reducing the recovery a condition that it shall be operative only in case the reduced amount shall be paid.¹⁹⁰

The mere fact that the successful party has declined to accept the offer of the other party to comply with a condition imposed on granting a new trial, and has appealed from the order which has resulted in affirmance, does not do away with the necessity of compliance with the conditions imposed.¹⁹¹

On setting aside the report of a referee as against the weight of evidence and ordering a new trial, the costs are in the discretion of the court and may be ordered to abide the event.¹⁹²

¹⁸⁵ *Seggerman v. Metropolitan St. R. Co.*, 38 Misc. 374, 77 N. Y. Supp. 905.

¹⁸⁶ *Bulkin v. Ehret*, 29 Abb. N. C. 62, 20 N. Y. Supp. 731.

¹⁸⁷ *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334; *Henderson v. Henderson*, 2 Abb. N. C. 102.

¹⁸⁸ *Crane v. Brooklyn Heights R. Co.*, 68 App. Div. 202, 74 N. Y. Supp. 117.

¹⁸⁹ *Hallet v. Cotton*, 1 Caines, 11, *Colem. & C. Cas.* 150; *Shuter v. Hallett, Colem. & C. Cas.* 330; *Shuter v. Hallet*, 1 Caines, 518.

¹⁹⁰ *Smith v. Dempsey*, 102 N. Y. 655.

¹⁹¹ *Stokes v. Stokes*, 38 App. Div. 215, 56 N. Y. Supp. 637.

¹⁹² *Wentworth v. Candee*, 17 How. Pr. 405.

§ 1958. Rehearing.

A reargument of a motion for a new trial will not be permitted except in extraordinary cases.¹⁹³ A rehearing of the motion for a new trial will not be granted by another judge,¹⁹⁴ though the judge hearing the motion may grant a rehearing on the same papers,¹⁹⁵ but will not where considerable time has elapsed and an execution has been issued, and a receiver appointed in supplementary proceedings.¹⁹⁶

§ 1959. Exception to order.

An exception does not lie to an order denying a motion for a new trial.¹⁹⁷

§ 1960. Appeal.

After a trial before a jury the facts cannot be reviewed on an appeal simply from the judgment but a motion for a new trial must be made, an order entered, and an appeal taken from the order.¹⁹⁸ The order granting or denying a new trial may be appealed from though no appeal is taken from the judgment.¹⁹⁹ The order, where made and entered before judgment and specified in the notice of appeal, may be reviewed on appeal from the judgment,²⁰⁰ but not where made and entered subsequent to the entry of judgment.²⁰¹ The discretion exercised by the judge who hears a motion for a new

¹⁹³ *Newell v. Wheeler*, 2 Abb. Pr. (N. S.) 134, 27 Super. Ct. (4 Rob.) 190.

¹⁹⁴ *Gantier v. Douglas Mfg. Co.*, 52 How. Pr. 325. See, also, *Wiley v. Rooney*, 41 State Rep. 444, 16 N. Y. Supp. 471.

¹⁹⁵ *Herzig v. Metzger*, 62 How. Pr. 355.

¹⁹⁶ *Rebhun v. Swartwout*, 3 N. Y. Supp. 419.

¹⁹⁷ *Matthews v. Meyberg*, 63 N. Y. 656; *Boos v. World Mut. L. Ins. Co.*, 64 N. Y. 226.

¹⁹⁸ *Collier v. Collins*, 172 N. Y. 99.

¹⁹⁹ *Voisin v. Commercial Mut. Ins. Co.*, 123 N. Y. 120.

²⁰⁰ *Taylor v. Smith*, 164 N. Y. 399; *Fox v. Matthiessen*, 155 N. Y. 177.

²⁰¹ *Id.*; *Zeisloft v. George V. Blackburne Co.*, 91 N. Y. Supp. 8.

trial on his minutes should not be disturbed on appeal except where clearly abused.²⁰⁰

§ 1961. Procedure on new trial.

The granting a new trial merely sets aside the verdict, report, or decision, and authorizes another trial which may be based on the same pleadings though an amendment of the pleadings may be allowed after a new trial has been granted.²⁰¹ Granting a new trial because of error in receiving evidence does not supersede an amendment of a pleading allowed at the trial and made by actual service of the amended pleading.²⁰² If there are no conditions contained in the order granting a new trial, such trial proceeds the same as if there had been no previous trial except that the decision on granting the order should be looked to as the law of the case.

²⁰⁰ *Lawrence v. Wilson*, 86 App. Div. 472, 83 N. Y. Supp. 821; *Northam v. Dutchess County Mut. Ins. Co.*, 68 App. Div. 475, 74 N. Y. Supp. 29.

²⁰¹ *Steinfeld v. Levy*, 16 Abb. Pr. (N. S.) 26.

²⁰² *Price v. Brown*, 5 State Rep. 7, 25 Wkly. Dig. 43.

PART XI.

JUDGMENTS.

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§ 1962. Scope of chapter.

This chapter on judgments is practically restricted to a consideration of the provisions contained in chapter eleven of the Code which relates to judgments. General matters relating to judgments where not governed by statute, such as the right to collaterally attack a judgment or the effect of a judgment as a bar or estoppel, will not be treated of in this work inasmuch as sufficient space cannot be devoted thereto. Furthermore, Code provisions relating only to judgments in special actions will not be treated of until subsequent chapters relating to such actions.

ART. I. NATURE, KINDS, CONTENTS, AND RELIEF GRANTED.

§ 1963. Definition.

A judgment is either interlocutory or the final determination of the rights of the parties in the action.¹ As generally defined, a judgment is the final determination of the rights of the parties in the particular action or proceeding, and must be rendered in conformity with the allegations of the pleadings as established by the evidence produced at the trial, and clearly express and define the rights of all parties whose interests are affected. Strictly, it is the final "sentence of the law pronounced by the court upon the matter contained in

¹ Code Civ. Proc. § 1280.

the record." Under the Code it is commonly understood as applicable to the formal record evidencing the result of the action.

§ 1964. Kinds of judgments.

Judgments are classified as final or interlocutory, domestic or foreign, and judgments in personam or judgments in rem. A judgment in personam is in form as well as in substance between the parties claiming the right in controversy. A judgment in rem is defined as an adjudication on the status of some particular matter by a tribunal of competent jurisdiction. It differs from a personal judgment in that the latter cannot be obtained against one not served with process within the state and not appearing in the action.*

— **Final and interlocutory.** A final judgment is a final determination of the rights of the parties in an action.[†] The Code definition of an interlocutory judgment has been repealed but the definition given by the court of appeals is as follows: "An interlocutory judgment is an intermediate or incomplete judgment, where the rights of the parties are settled but something remains to be done. As when there is an accounting to be had, a question of damages to be ascertained, or a reference required to determine the amount of rent due for use and occupation."[‡] The practice of entering an inter-

* *Park v. Park*, 53 N. Y. Supp. 677, 24 Misc. 372; *Booth v. Kingsland Ave. Bldg. Ass'n*, 46 N. Y. Supp. 457, 18 App. Div. 407.

† Code Civ. Proc. § 1200.

‡ *Cambridge Valley Nat. Bank v. Lynch*, 76 N. Y. 514. That which decides not the cause, but only some intervening matter relating to the cause. *Mora v. Sun Mut. Ins. Co.*, 13 Abb. Pr. 304; *Moza v. Same*, 22 How. Pr. 60. If, in equitable actions, all the questions in controversy between the parties have been determined upon the hearing, and what remains is merely the machinery set in motion by the court to carry its decision into effect, its decision is final. But if anything is left involving future litigation, the determination upon which might affect the ultimate adjustment of the rights of the parties, the decision, decree, or order made is merely interlocutory, and this is a distinction which still exists necessarily in actions for equitable relief. *Smith v. Lewis*, 1 Daly, 452.

locutory judgment originated in chancery, but it is now often resorted to where the cause of action is legal in its nature and the trial is before a jury.¹ As a general rule, when a judgment directs a reference, though it provides for the decision of the main question at issue, it is deemed interlocutory;² but this is so only where there is something reserved for the court judicially to determine. Therefore, a judgment of foreclosure directing a sale of the premises and that defendant pay any deficiency is final.³ A judgment foreclosing a lien is final notwithstanding it appoints a referee to compute and sell and provides for a deficiency judgment.⁴ So a judgment of foreclosure which allows the mortgagor to pay specified amounts within six months and obtain a reconveyance of the property, but upon failure to do so the property to be sold, the mortgage foreclosed and the proceeds brought into court and applied in the usual manner, is a final judgment, the only remaining essential being for the court to direct how and by what officer the sale should be made.⁵ So a decree that a certain sum, which has been ascertained by a reference, be paid into court, to await the further order of the court, and to be distributed according to law, and which reserves no further question between the plaintiff and defendant, is a final judgment.⁶ And a judgment on account of the frivolousness of a pleading is a final judgment,⁷ as is a judgment rendered on a nonsuit.¹¹ But a final judgment cannot be entered while a portion of the material issues remain undetermined.^{12, 13}

¹ The dicta in the contrary in *Cornell v. Cornell*, 96 N. Y. 198, has not been followed. That case held, however, that if a jury was waived and the case tried by the court, an interlocutory judgment might be rendered. See note on interlocutory judgments in 21 Abb. N. C. 317.

² *Klug v. Harpo*, 187 N. Y. 642; *McKeown v. O'Connor*, 127 N. Y. 687.

³ *Morris v. Morison*, 34 N. Y. 172; *Mills v. Hoag*, 7 Paige, 18; *Wager v. Link*, 134 N. Y. 322; *Rayner v. Rayner*, 74 N. Y. 248.

⁴ *Beattie v. Gardner*, 77 Misc. 874, 98 N. Y. Supp. 824.

⁵ *Heath v. New York Bldg. Loan Banking Co.*, 91 Hun, 176, 71 State Rep. 136, 38 N. Y. Supp. 212. See also *Moulton v. Cornish*, 135 N. Y. 163, 136.

⁶ *Gray v. Cook*, 24 How. Pr. 422.

⁷ *Roberts v. Morrison*, 7 How. Pr. 306.

¹¹ *Gale v. Canfield*, 2 Civ. Proc. R. (Brown) 254, 256.

N. Y. Prac.—173.

A judgment after a decision on a demurrer, without leave to plead over or amend, is a final judgment, while if leave is granted to plead over or amend it is interlocutory.¹⁴ So if the court, by judgment, refuses equitable relief but allows the action to be continued to enable plaintiff to recover damages, such a judgment is interlocutory.¹⁵ And a determination in which not only the question of costs is expressly reserved, but which provides for further action by the court, upon the coming in of the report of a referee appointed by it, is not a final judgment.¹⁶ It is proper that an interlocutory judgment should determine the value of the subject-matter involved in the action, where it may be made the basis of an application for an extra allowance, even though its value be not otherwise material to the judgment.¹⁷

A judgment based entirely on a stipulation may be prevented from being final by the stipulation.¹⁸

The main importance of the distinction between final and interlocutory judgments is that the latter are not appealable to the court of appeals. Furthermore, the right to costs may depend on whether the judgment is final or interlocutory. And the doctrine of *res judicata* does not apply to interlocutory judgments.¹⁹

§ 1965. Judgment or order.

The difference between a judgment and order has been considered in a preceding volume.²⁰ A final order in a special

^{12, 13} *Bucking v. Hauselt*, 9 Hun, 633; *Delano v. Rice*, 26 Misc. 502, 57 N. Y. Supp. 678.

¹⁴ See Code Civ. Proc. § 3232; *Campbell v. New York Cotton Exch.*, 47 Super. Ct. (15 J. & S.) 558; *Maeder v. Wexler*, 43 Misc. 19, 87 N. Y. Supp. 402; *Biershenk v. Stokes*, 46 State Rep. 179, 18 N. Y. Supp. 854; *Romaine v. Brewster*, 10 Misc. 120, 30 N. Y. Supp. 948; *Funson v. Philo*, 27 Misc. 262, 58 N. Y. Supp. 419; *Hoffman v. Barry*, 2 Hun, 52. See, also, *United States L. Ins. Co. v. Jordan*, 21 Abb. N. C. 339.

¹⁵ *Fitzpatrick v. Dorland*, 27 Hun, 291, 295.

¹⁶ *Belmont v. Ponvert*, 26 Super. Ct. (3 Rob.) 693.

¹⁷ *Munro v. Smith*, 23 Abb. N. C. 275, 6 N. Y. Supp. 426.

¹⁸ *Simpson v. McKay*, 3 T. & C. 65.

¹⁹ *Metropolitan El. R. Co. v. Manhattan R. Co.*, 14 Abb. N. C. 103, 215.

²⁰ Volume 1, p. 617.

proceeding cannot be the basis of a separate and independent judgment.²³

§ 1966. Number of judgments in one action.

The cases hold that there can be but one "final" judgment in an action²⁴ except where the action is severed.²⁵ Thus, only one judgment should be entered where plaintiff recovered a nominal sum and defendant's judgment for costs exceeds the amount of plaintiff's judgment.²⁶ But judgment may be entered for different sums against several defendants where plaintiff is entitled to recover more costs as against some of them than against the others.²⁷

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff.²⁸ In cases not already specified, where a counterclaim is established which entitles the defendant to an affirmative judgment demanded in the answer, judgment must be rendered for the defendant accordingly.²⁹

²³ *Matter of Lexington Ave.*, 70 App. Div. 609, 52 N. Y. Supp. 342.

²⁴ Where an equitable counterclaim in a common-law action is ordered to be separately tried, judgment thereon cannot be entered before the common-law issue is tried. *DeLano v. Rice*, 26 Misc. 502, 57 N. Y. Supp. 678. The matter of a cross suit being but a defense to the original action, and both being tried together, but one judgment should be entered. *Shimpos v. McKay*, 2 T. & C. 65. Where plaintiff recovers less than \$50, and defendant becomes, therefore, entitled to costs, it is improper to enter separate judgments. One judgment only should be entered for the difference between the verdict and the costs, in favor of the party entitled to it. *Warden v. Frost*, 35 Hun, 141.

²⁵ *DeLano v. Rice*, 57 N. Y. Supp. 678, 26 Misc. Rep. 502. See note in 31 *Abb. N. C.* 461.

²⁶ Judgment should be entered for difference. *Warden v. Frost*, 35 Hun 141.

²⁷ *Fox v. Muffer*, 21 Misc. 470, 64 N. Y. Supp. 388.

²⁸ Code Civ. Proc. § 503. See *Inliffe v. Hampton*, 11 Hun, 156; *Ogden v. Coddington*, 2 E. D. Smith 317.

²⁹ Code Civ. Proc. § 504.

§ 1967. Form and contents.

With respect to judgments in general, the Code is silent as to their form and contents. Generally speaking, however, a judgment is sufficient if the time, place, parties, matter in dispute, and the result are clearly stated.²⁸ The judgment must show the court in which it was rendered, the parties to the litigation, the adjudication, and be signed by the clerk. The usual practice is to set forth in the preliminary part the nature of the issues, the time and place of the trial, the name of the judge, the fact, if so, that defendant appeared, the prevailing party, and the adjustment of costs including the amount thereof. It is sometimes the safer practice to insert other recitals though they are not conclusive as to jurisdiction²⁹ but merely prima facie evidence of the facts recited.³⁰ The judgment need not recite the particulars of the decision.³¹ The judgment proper usually commences with the words "It is adjudged" though there is no set form and equivalent words may be used. If the complaint is dismissed "on the merits" the judgment should contain a recital to that effect,³² since the Code provides that a final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits.³³ A mere nonsuit does not warrant a judgment dismissing the complaint on the merits,³⁴ nor does a dismissal

²⁸ 11 Enc. Pl. & Pr. 930.

²⁹ *Ferguson v. Crawford*, 70 N. Y. 253; *Smith v. Reid*, 134 N. Y. 568.

³⁰ *Steinam v. Strauss*, 44 State Rep. 380, 18 N. Y. Supp. 48.

³¹ *Bunten v. Orient Mut. Ins. Co.*, 21 Super. Ct. (S Bosw.) 448, 460; *Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51.

³² See *Hicks v. Shives*, 65 App. Div. 447, 72 N. Y. Supp. 867. Compare *Martin v. Bronsveld*, 60 State Rep. 619, 29 N. Y. Supp. 1119.

³³ Code Civ. Proc. § 1209.

³⁴ *Thiry v. Taylor Brew. & Malting Co.*, 56 N. Y. Supp. 85, 37 App. Div. 391; *Terry v. Horne*, 59 Hun, 492, 13 N. Y. Supp. 353. Where the minutes of the court show simply that the complaint was dismissed, the clerk has no power to add in the judgment the words "upon the merits." *Freeman v. United States Elec. Light Co.*, 59 Hun, 341, 36 State Rep. 542, 20 Civ. Proc. R. (Browne) 177, 13 N. Y. Supp. 93.

for want of jurisdiction.³⁵ A memorandum filed by a trial judge, stating the grounds of his decision, is no part of the judgment.³⁶

—**Names of parties.** A judgment should designate the parties for and against whom it is rendered, and they should be described with sufficient certainty to enable the clerk to issue execution.³⁷ But the judgment need not contain a middle initial letter of the name of the judgment debtor.³⁸ And the name of a party is sufficient though the initials are used for the given or Christian name.³⁹ So a judgment against "*William B. Gottlieb*" is not void though suit was against "*W. B. Gottlieb*."⁴⁰ And the fact that defendant is described in the judgment merely by his surname is a defect which may be amended.⁴¹ In an action against several defendants, a judgment against "defendant" cannot stand as a judgment against either one of the defendants.⁴²

As before stated,⁴³ if either party dies after verdict, report, or decision, etc., but before final judgment is entered, the court must enter final judgment in the names of the original parties.

A judgment for plaintiff for a sum of money, where the action is against an executor or administrator personally and also in his representative capacity, must distinctly show whether it is awarded against the defendant personally or in his representative capacity.⁴⁴

—**Amount.** All judgments for money must specify the amount for which they are rendered. If there has been an

³⁵ *Smith v. Adams*, 24 Wend. 585; *Blake v. Barnes*, 28 Abb. N. C. 401, 45 State Rep. 120, 18 N. Y. Supp. 471.

³⁶ *Forgotson v. Raubitschek*, 87 N. Y. Supp. 503.

³⁷ 11 Eccl. Pl. & Pr. 948.

³⁸ *Clute v. Emmerich*, 26 Hun. 10, 12.

³⁹ *Gottlieb v. Alton Grain Co.*, 87 App. Div. 380, 84 N. Y. Supp. 413.

⁴⁰ *Gottlieb v. Alton Grain Co.*, 87 App. Div. 380; 84 N. Y. Supp. 413. But it is held that a judgment against "Zachariah" Berlin would not authorize proceedings against the property of "Zax" Berlin. *Meurer v. Berlin*, 80 App. Div. 294, 80 N. Y. Supp. 240.

⁴¹ *Von Hatten v. Scholl*, 1 App. Div. 32, 36 N. Y. Supp. 771.

⁴² *Zimmer v. Bantel*, 28 State Rep. 899, 8 N. Y. Supp. 374.

⁴³ Volume 2, p. 2100.

⁴⁴ Code Civ. Proc. § 1815.

offer of judgment and a more favorable judgment is not recovered, the defendant's costs should be offset against the verdict and plaintiff awarded judgment for the balance, stating the amount thereof.⁴⁵ Judgment may be entered for different sums against several defendants where plaintiff is entitled to recover more costs as against some of them than against others.⁴⁶

— **Alternative judgment.** A conditional or alternative judgment may be rendered if there is evidence to support both branches of the judgment.⁴⁷

— **Provisions as to enforcement.** Ordinarily a judgment should make no provision for its enforcement. But it is not ground of reversal that a judgment contains a clause requiring defendant to pay "forthwith" since such a clause is a mere nullity.⁴⁸

— **Date.** A judgment may be dated as of the day when the court ordered it entered,⁴⁹ but it cannot be antedated.⁵⁰

— **Signature.** A judgment need not be signed by the judge⁵¹ except where an interlocutory judgment is rendered, with a direction that the final judgment be settled by the court or referee, in which case the signature of the court or referee to the final judgment is required.⁵² But every interlocutory or final judgment must be signed by the clerk.⁵³

— **Form of judgment on general verdict.**

[Title of court and action.]

The issues in this action having been brought on for trial before
 ——— and a jury, at a trial term of this court, held on the ——— day

⁴⁵ Coatsworth v. Ray, 28 Civ. Proc. R. (Kerr) 6, 52 N. Y. Supp. 498.

⁴⁶ Fox v. Muller, 64 N. Y. Supp. 388, 31 Misc. 470.

⁴⁷ Reilly v. Freeman, 1 App. Div. 560, 73 State Rep. 224, 37 N. Y. Supp. 570.

⁴⁸ Simmons v. Craig, 137 N. Y. 550.

⁴⁹ Clark v. Clark, 52 State Rep. 228, 22 N. Y. Supp. 646. See, also, Barelay v. Brown, 7 Paige, 245.

⁵⁰ Roberts v. White, 39 Super. Ct. (7 J. & S.) 272, 276.

⁵¹ De Laney v. Blizzard, 7 Hun, 66.

⁵² Code Civ. Proc. § 1231; Clapp v. Hawley, 97 N. Y. 610.

⁵³ Code Civ. Proc. § 1236.

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of ———, 190—, at the county court house in the city of ——— and county of ———, and the defendant appearing by counsel, and the issues having been tried and a verdict for ——— having been duly rendered on the ——— day of ———, 190—, and the costs of the said ——— having been duly adjusted at ——— dollars: Now, on motion of ———, attorney for ———,

It is adjudged that said ——— do recover of said ——— the sum of ——— dollars found by the jury, with ——— dollars costs, amounting in all to ——— dollars [if verdict was for defendant, insert "that defendants have judgment against the plaintiff on the issues in this action, dismissing the complaint on the merits, and for the sum of ——— dollars costs"]

Judgment signed and entered this ——— day of ———, 190—.

_____,
Clerk.

§ 1968. Parties for or against whom judgment may be rendered.

Section 1204 of the Code provides that judgment may be rendered as follows:

1. For or against one or more plaintiffs.
2. For or against one or more defendants.
3. Determining the ultimate rights of the parties on the same side, as between themselves.
4. Granting to a defendant any affirmative relief to which he is entitled.

— **Against a part of defendants.** In addition to the general provision that judgment may be taken "for or against one or more defendants" the Code further provides as follows: "Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment against one or more of the defendants, and direct that the action be severed, and proceed against the others, as the only defendants therein."⁴ The clause "or require the plaintiff to take judgment" was added by the present Code in order to provide for a case where some of the defendants are in default and equity requires that the plaintiff should first proceed

⁴ Code Civ. Proc. § 1205.

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against them.⁵⁵ This last Code provision is not limited in its application to cases of joint and several liability but authorizes a separate judgment where a separate liability of some of the defendants is established on the trial though the cause of action, as alleged in the complaint, is joint only.⁵⁶ This Code rule has been applied to an action on a joint and several bond,⁵⁷ to an action against the maker and a guarantor of a promissory note,⁵⁸ and to an action where the maker and an indorser are sued.⁵⁹ In an action based on a tort, judgment may be entered against a part of the defendants.⁶⁰ For instance, in an action for conspiracy, a recovery may be had against one defendant for fraud though the conspiracy be not made out.⁶¹ But the rule which prevailed prior to the Code that when several defendants are sued, for a wrong in which all join, the damages cannot be severed and that if the jury or referee severs the damages, plaintiff may enter a judgment against all the defendants for the largest amount found against any, still applies.⁶²

These Code provisions modify the common-law rule that in actions based on a joint contract judgment could not be taken against a part of defendants except where one pleaded the insolvent act, bankruptcy, infancy, or other defense merely personal in its nature.⁶³

— **Affirmative relief against a co-defendant.** The judg-

⁵⁵ Note to Code Civ. Proc. § 1205 in Throop's Ann. Code.

⁵⁶ *Stedeker v. Bernard*, 102 N. Y. 327; *Owen v. Conner*, 33 State Rep. 144, 11 N. Y. Supp. 352.

⁵⁷ *Broome v. Taylor*, 76 N. Y. 564.

⁵⁸ *Hier v. Staples*, 51 N. Y. 136.

⁵⁹ *Lomer v. Meeker*, 25 N. Y. 361.

⁶⁰ *Wagener v. Bill*, 19 Barb. 321; *Layton v. McConnell*, 61 App. Div. 447.

⁶¹ *Griffing v. Diller*, 50 State Rep. 435, 21 N. Y. Supp. 407; *Betz v. Daily*, 3 State Rep. 309. See, also, *Lockwood v. Bartlett*, 130 N. Y. 340.

⁶² *Bohun v. Taylor*, 6 Cow. 313; *Beales v. Finch*, 11 N. Y. (1 Kern.) 128, 9 How. Pr. 385; *O'Shea v. Kirker*, 8 Abb. Pr. 69, 17 Super. Ct. (4 Bosw.) 120; *Hoffman v. Schwartz*, 11 Civ. Proc. R. (Browne) 200; *Lee v. McLaughlin*, 16 Civ. Proc. R. (Browne) 151.

⁶³ *McGuire v. Johnson*, 2 Lans. 305; *Barker v. Cocks*, 50 N. Y. 689.

ment may determine the ultimate rights of the parties on the same rule as between themselves. But a defendant must demand such relief in his answer, a copy of which must be served, at least twenty days before the trial, on the attorney, for each of the defendants to be affected by the determination, and personally, or as the court or judge may direct, on defendants so to be affected who have not duly appeared therein by attorney.⁶⁴ The conditions precedent are service of the answer on the co-defendant⁶⁵ and a prayer for affirmative relief against the co-defendant in the answer.⁶⁶ A judgment in favor of one defendant against another cannot be entered on the default of the latter unless he has had notice and an opportunity to defend against his co-defendant.⁶⁷ Furthermore, the persons named as co-defendants must be proper parties;⁶⁸ the matters set up against the co-defendant must relate to the cause of action set forth in the complaint,⁶⁹ and there must be an actual litigation of the question before the court since the relief cannot be granted on motion.⁷⁰ So where plaintiff fails to sustain his complaint, the court cannot grant relief as between co-defendants.⁷¹ This Code provision applies to legal as well as to equitable actions.⁷² An action in which the plaintiff seeks not only a money judgment, but to

⁶⁴ Code Civ. Proc. § 321. For further construction of this provision, see vol. I, p. 893.

⁶⁵ *Mason's Supplies Co. v. Jones*, 18 App. Div. 231, 68 N. Y. Supp. 806; *McGuckin v. Mitchell*, 81 Hun. 473, 476. If no issues have been made between the several defendants the court cannot give judgment in favor of one defendant against others merely on the confirmation of a referee's report finding a certain sum due by the latter to the former, *Stephens v. Hall*, 23 Super. Ct. (2 Rul.) 674.

⁶⁶ *Mason's Supplies Co. v. Jones*, 68 N. Y. Supp. 806; 58 App. Div. 231.

⁶⁷ *Ostryander v. Hart*, 130 N. Y. 406; *Woodworth v. Bellows*, 4 How. Pr. 24.

⁶⁸ *Smith v. Howard*, 4 Sandf. 14; *Wells v. Smith*, 7 Abb. Pr. 261.

⁶⁹ *Van Allen v. Rogers*, 3 Misc. 426, 26 N. Y. Supp. 738. See, also, dissenting opinion of O'Brien, J. 16 *Powers v. Savin*, 64 Hun. 360.

⁷⁰ *Nashbury v. Sealey*, 4 How. Pr. 74.

⁷¹ *Marlin v. Wagner*, 1 T. & C. 309; *Hall v. Dusen*, 5 Abb. N. C. 198;

Dusenbury v. Fisher, 47 Super. Ct. (15 J. & S.) 482.

⁷² *DeBarn v. Lee*, 17 Super. Ct. (15 J. & S.) 174, 69 How. Pr. 234.

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extinguish an adverse hostile claim to the money in controversy, and in which for that purpose the adverse claimant has been made a party defendant, is one in which the court, having all the facts and all the parties before it, can adjust the rights not only between the plaintiff and the defendants, but between co-defendants, and can determine not only the amount due, but the party to whom it shall be paid.⁷⁴

— **Affirmative relief to defendant.** The Code provides that the judgment may grant to a defendant any affirmative relief to which he may be entitled.⁷⁵ This means such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of parties, as established by the evidence, and not that redress which is equally applicable after as before judgment, and may be obtained on motion or by action.⁷⁶ It does not apply where a complete determination of the controversy presented by the answer, and upon which the relief is demanded, cannot be had without the presence of other parties, who can only be properly brought in by defendant by a cross action.^{76, 77} It would seem that the court has "power" to administer such affirmative relief though not specifically prayed for in the answer, especially in an equitable action,⁷⁸ though ordinarily affirmative relief will not be granted where not demanded in the answer which merely sets up a defense,⁷⁹ unless no objection is taken until after trial;⁸⁰ but an affirmative judgment on a counterclaim will not be granted unless demanded in the answer.⁸¹ The court may, however, grant relief to a defend-

⁷⁴ Code Civ. Proc. § 1204. In an action to have a mortgage declared invalid where plaintiff fails, it is not necessary for defendant to institute an independent action to foreclose, but defendant may have such relief by decree if the necessary conditions appear from the pleadings and proof. *Earle v. Robinson*, 84 Hun, 577, 65 State Rep. 851, 32 N. Y. Supp. 730.

⁷⁵ *Garner v. Hannah*, 13 Super. Ct. (6 Duer) 262.

^{76, 77} *Smith v. Howard*, 20 How. Pr. 151.

⁷⁸ *House v. Lockwood*, 137 N. Y. 259.

⁷⁹ *Wright v. Delafield*, 25 N. Y. 266.

⁸⁰ *Cythe v. La Fontain*, 51 Barb. 186.

⁸¹ Code Civ. Proc. § 509.

ant, where sought in the complaint, though defendant does not answer.⁸⁷

—**Judgment for or against married woman.** Judgment for or against a married woman may be rendered and enforced, in a court of record, or not of record, as if she was single.⁸⁸

§ 1969. Extent and nature of relief granted.

The Code provides as follows: "Where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue."⁸⁹

—**Where there is no answer.** Taking up first the provision that where there is no answer the judgment shall not be more favorable to the plaintiff than that demanded in the complaint, it is easy to see the reason for the rule. If a defendant, after reading the complaint, does not wish to contest the suit, he can rely on the fact that nothing "more favorable" to plaintiff will be adjudicated against him than the relief demanded in such complaint.⁹⁰ For instance, in an action for partition where no answer is interposed, defendants cannot be required to account for rents where such relief is not specifically prayed for in the complaint.⁹¹ So a judgment for a deficiency cannot be granted in a foreclosure suit where no such relief is sought.⁹² And where all the allegations of the complaint are made for the purpose of procuring equitable

⁸⁷ *McWhirter v. Brown*, 82 App. Div. 141, 81 N. Y. Supp. 747.

⁸⁸ Code Civ. Proc. § 1296.

⁸⁹ Code Civ. Proc. § 1297; *Rugers v. New York & T. Land Co.*, 134 N. Y. 197.

⁹⁰ See *Clapp v. McCullo*, 155 N. Y. 525. A judgment based entirely on a cause of action found in the complaint but on account of which no relief is asked is more favorable than demanded. *Hasbrouck v. New Paltz, H. & P. Traction Co.*, 90 N. Y. Supp. 977.

⁹¹ *Bellwinker v. Ryker*, 12 Abb. Pr. 311.

⁹² *Simmons v. Blake*, 12 Abb. Pr. 331, 333.

Art. I. Nature, Contents, etc.—Extent and Nature of Relief Granted.

relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed;⁸⁸ though if both legal and equitable relief are asked for, either may be granted.⁸⁹ A demurrer, however, is not an answer within this Code section.⁹⁰

The objection to a judgment more favorable than demanded is not to its irregularity but that it is altogether unauthorized so that the judgment may be set aside on motion even after the lapse of a year.⁹¹ Furthermore, defendant's remedy is not confined to a motion, but he may resist or attack the judgment against him in any form that he may elect.⁹² On the other hand, a person not a defendant nor interested in the defense of the action cannot rely on the Code provision.⁹³

— **Where there is an answer.** If there is an answer, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue. Observe that the two limitations are that the judgment shall be "consistent"⁹⁴ with the case made and "embraced within the issue." The rule does not authorize judgment in direct hostility to the theory of the action and the substantial allegations of the complaint; the judgment must be *secundum allegata et probata*.⁹⁵ The provision means that a plaintiff is not to be turned out of court, when an answer has been interposed, because he prays for too much or too little, or

⁸⁸ *Swart v. Boughton*, 35 Hun, 287; *Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277; *Black v. Vanderbilt*, 70 App. Div. 16, 20, 74 N. Y. Supp. 1095.

⁸⁹ *Squiers v. Thompson*, 73 App. Div. 552, 76 N. Y. Supp. 734.

⁹⁰ *Kelly v. Downing*, 42 N. Y. 71; *Parker v. John Pullman & Co.*, 36 App. Div. 208, 56 N. Y. Supp. 734.

⁹¹ *Simonson v. Blake*, 12 Abb. Pr. 331, 333.

⁹² *Clapp v. McCabe*, 155 N. Y. 525, 532.

⁹³ *Peck v. New York & N. J. R. Co.*, 85 N. Y. 246, 251.

⁹⁴ *Bradley v. Aldrich*, 40 N. Y. 504, 510; *Saltus v. Genin*, 16 Super. Ct. (3 Bosw.) 250, 7 Abb. Pr. 193; *Cowenhoven v. Brooklyn*, 38 Barb. 9; *Towle v. Jones*, 24 Super. Ct. (1 Rob.) 87, 19 Abb. Pr. 449.

⁹⁵ *Graham v. Read*, 57 N. Y. 681. See, also, *National Commercial Bank v. Lackawanna Transp. Co.*, 59 App. Div. 270, 274, 69 N. Y. Supp. 396.

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for wrong, relief.⁹⁶ In other words, plaintiff is not confined to the relief which he demands in his complaint, but the court may award such judgment as he is entitled to under the evidence,⁹⁷ subject to the conditions noted. Thus where all the facts necessary to make out a cause of action of an equitable nature are alleged in the complaint, and they are not such as are merely incidental to another and totally different cause of action, the fact that only a money judgment is asked for will not prevent the court from granting equitable relief.⁹⁸

If facts showing a right to both legal and equitable relief are stated, either may be granted,⁹⁹ but if the allegations warrant only legal relief, then equitable relief cannot be granted on the evidence,¹⁰⁰ and vice versa.¹⁰¹ For instance, where the complaint is framed solely for equitable relief and the action is tried as an action in equity, the court, on finding that the plaintiff is not entitled to any equitable relief, but that the facts would warrant an action for damages not alleged or claimed, cannot order judgment for such damages.¹⁰² It has been held, however, that the demand for an accounting, in an action based on a contract, does not preclude a money judgment where an answer has been interposed.¹⁰³ No judgment can be given in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings or evidence.¹⁰⁴

A recovery *ex contractu* is not allowable in an action *ex delicto*.¹⁰⁵ For instance, a recovery cannot be had for money

⁹⁶ *Murtha v. Curley*, 90 N. Y. 372, 377.

⁹⁷ *Finlayson v. Wiman*, 84 Hun, 357, 360, 32 N. Y. Supp. 347.

⁹⁸ *Bell v. Merrifield*, 109 N. Y. 202.

⁹⁹ *New York Ice Co. v. Northwestern Ins. Co.*, 23 N. Y. 357.

¹⁰⁰ *Stevens v. City of New York*, 84 N. Y. 296.

¹⁰¹ *Mann v. Fairchild*, 2 Keyes, 111; *Dudley v. Congregation of Third Order of St. Francis*, 65 Hun, 21, 25, 19 N. Y. Supp. 605; *Hawes v. Dobbs*, 44 State Rep. 890, 18 N. Y. Supp. 123.

¹⁰² *Wheelock v. Lee*, 74 N. Y. 495, 500.

¹⁰³ *Chaurant v. Maillard*, 56 App. Div. 11, 67 N. Y. Supp. 345.

¹⁰⁴ *Truesdell v. Sarles*, 104 N. Y. 164, 166.

¹⁰⁵ *Degraw v. Elmore*, 50 N. Y. 1; *Ross v. Mather*, 51 N. Y. 108;

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had and received where a cause of action sounding in tort is set forth in the complaint.¹⁰⁶ So a recovery *ex delicto* cannot be had where the complaint sets forth a cause of action based on a contract.¹⁰⁷

A recovery for part of the relief asked for is proper where the evidence authorizes such relief though it does not authorize other relief asked for.¹⁰⁸

An amount greater than the sum demanded cannot be recovered.¹⁰⁹ This rule applies to a counterclaim.¹¹⁰ But where the verdict is in excess of the amount claimed, the trial court may, after verdict, allow the complaint to be amended so as to support the verdict.¹¹¹ Furthermore, no recovery can be had in excess of the amount stated in the bill of particulars.¹¹²

—**Determination of rights of parties as of time when action was commenced.** The rights of the parties in an action at law must be determined as they were when the action was brought,¹¹³ notwithstanding the existence of an equitable

Smith v. Smith, 4 App. Div. 227, 38 N. Y. Supp. 551; *Kress v. Woehrlé*, 23 Misc. 472, 52 N. Y. Supp. 628.

¹⁰⁶ *Allen v. Allen*, 52 Hun. 398, 5 N. Y. Supp. 518; *Boehm v. Miller*, 45 State Rep. 281, 18 N. Y. Supp. 137.

¹⁰⁷ *Fisher v. Frdenhall*, 21 Barb. 82; *Beard v. Yates*, 2 Hun. 466.

¹⁰⁸ *Colton v. Jones*, 30 Super. Ct. (7 Rob.) 164; *Bosworth v. Higgins*, 26 State Rep. 474, 7 N. Y. Supp. 210; *Spring v. Bowne*, 89 Hun. 10, 35 N. Y. Supp. 46; *Leprell v. Kleinschmidt*, 112 N. Y. 364. A complaint alleging defendant's unlawful entry upon plaintiff's premises and its continued possession and withholding of the same, stating that such entry was made by stretching electric wires across the premises, and that such possession is still held for the purpose of transmitting electricity across the premises upon such wires, although containing all the elements of a complaint in ejectment, is qualified by the additional allegations, and where they are supported by the proof, the action may be retained for the purpose of awarding a judgment for the removal of such wires. *Plummer v. Gloversville Elec. Co.*, 20 App. Div. 527, 47 N. Y. Supp. 228.

¹⁰⁹ Volume 1, p. 1032.

¹¹⁰ *Annis v. Upton*, 66 Barb. 370. But see *Rider v. Foggan*, 37 State Rep. 438, 14 N. Y. Supp. 59.

¹¹¹ *Jenks v. Van Brunt*, 6 Civ. Proc. R. (Browne) 158.

¹¹² *Morrison v. L'Hommedieu*, 15 App. Div. 623, 44 N. Y. Supp. 79.

¹¹³ *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Caswell v. Kémp*, 41 Hun. 434.

defense.¹¹⁴ This general rule is subject to the exception, however, that where a fact has arisen subsequent to the joining of the issue, which either increases, diminishes, or extinguishes the right to a recovery, such fact can always be proved and considered in a legal action where the same has been set out by appropriate allegations in a supplementary or amended complaint or answer.¹¹⁵ In equity, while the jurisdiction depends on plaintiff's position and the relief to which he is entitled at the time of bringing the action, the measure of relief will be adapted to that which he is entitled to at the time of the decree.¹¹⁶

§ 1970. Judgment on part of issues and severance of action.

Where an issue of law and an issue of fact arise, with respect to different causes of action set forth in the complaint, and final judgment can be taken, with respect to one or more of the causes of action, without prejudice to either party in maintaining the action, or a defense or counterclaim, with respect to the other causes of action, or in the recovery of final judgment upon the whole issue, the court may, in its discretion, and at any stage of the action, direct that the action be divided into two or more actions, as the case requires.¹¹⁷

§ 1971. Interest on judgment.

A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it is entered. But where a judgment directs that money paid out shall be refunded or repaid, the direction

¹¹⁴ *Whiting v. Dowdall*, 21 Hun, 105.

¹¹⁵ *Industrial & General Trust v. Tod*, 93 App. Div. 263, 87 N. Y. Supp. 687.

¹¹⁶ *Peck v. Goodberlett*, 109 N. Y. 180; *Pond v. Harwood*, 139 N. Y. 111; *Lyle v. Little*, 28 App. Div. 181, 59 N. Y. Supp. 947.

¹¹⁷ Code Civ. Proc. § 1220. This section applied in *Stokes v. Stokes*, 31 Abb. N. C. 464, 39 N. Y. Supp. 153, which was an action for several libels alleged as separate causes of action.

includes interest from the time when the money was paid, unless the contrary is expressed.¹¹⁸

ART. II. AS DEPENDENT ON NATURE OF ISSUE, MODE OF TRIAL, AND COURT.

§ 1972. Judgment on a verdict.

The mode of entry of judgment on a verdict depends on whether the verdict is a general or a special verdict.

— **General verdict.** In cases where a general verdict is rendered, there is no judgment pronounced except by the record. The judgment itself is usually made up in the clerk's office.¹¹⁹ The Code provides that the clerk must, on the application of a party in whose favor a general verdict is rendered, enter judgment in conformity to the verdict unless a different direction is given by the court or it is otherwise specially prescribed by law.¹²⁰ But if exceptions are ordered heard in the first instance by the appellate division, judgment cannot be entered until a decision by the appellate division if the order provides for a suspension of the judgment.¹²¹

It will be noticed that the Code provides that the judgment must conform to the verdict, and hence the clerk can neither enlarge nor abridge the scope or operation of the judgment.¹²² But failure of the judgment to conform to the verdict may be waived by failure to promptly move to conform the judgment to the verdict.¹²³ If a mistake is made by the clerk in entering judgment, it can be remedied by motion to the court and by appeal from the order made thereon. The remedy is not

¹¹⁸ Code Civ. Proc. § 1211; *McIntyre v. Strong*, 2 Civ. Proc. R. (Brown) 36. Merely reiteration of common-law rule. *Donnelly v. Brooklyn*, 121 N. Y. 9. Duty of clerk to add interest, see post, § 1982.

¹¹⁹ *Lynch v. Rome Gas Light Co.*, 42 Barb. 591.

¹²⁰ Code Civ. Proc. § 1189; *Morrison v. New York & N. H. R. Co.*, 32 Barb. 568.

¹²¹ Rule formerly was that judgment could not be entered in any event. Code Civ. Proc. § 1000; *Matter of Welch*, 14 Barb. 396; *King v. Van Duzer*, 12 Wkly. Dig. 562. Entry of judgment as security, see ante, § 1943.

¹²² *Brusie v. Peck Bros. & Co.*, 62 Hun. 248, 16 N. Y. Supp. 645.

¹²³ Waived by taking an appeal. *Brigg v. Hilton*, 99 N. Y. 517, 531.

by appeal from the judgment.¹²⁴ A judgment rendered upon a general verdict in favor of a defendant should contain an adjudication upon the issues in the action, and is defective if it simply awards costs to such defendant.¹²⁵ The court cannot, on a joint verdict, authorize separate judgments.¹²⁶

If double, treble, or other increased damages are given by statute, single damages only are to be found by the jury, except in a case where the statute prescribes a different rule. The sum so found must be increased by the court and judgment rendered accordingly.¹²⁷ This Code provision is merely declaratory of the common law.¹²⁸

—**Special verdict.** A motion for judgment, upon a special verdict, may be made by either party; and must, in the first instance, be heard and decided, at a term held by one judge.¹²⁹ The nature and requisites of a special verdict have been considered in another chapter.¹³⁰ The jury finds the facts in issue between the parties, and the court merely applies the law to the facts and declares what judgment shall be rendered. The court cannot look into the evidence itself to ascertain the facts or any of them.¹³¹ The motion is an enumerated one¹³² to be brought on at special term on the regular notice of motion, and is governed by the practice set forth in a preceding volume.¹³³

§ 1973. Judgment after trial by court or referee of issues of fact.

The mode of entry of judgment where a trial of all the

¹²⁴ *Sternberger v. Bernheimer*, 50 Super. Ct. (24 J. & S.) 323, 4 N. Y. Supp. 546.

¹²⁵ *Overton v. National Bank of Auburn*, 3 State Rep. 169.

¹²⁶ *McVean v. Stuart*, 46 Barb. 379.

¹²⁷ Code Civ. Proc. § 1184.

¹²⁸ *Layton v. McConnell*, 61 App. Div. 447, 70 N. Y. Supp. 679.

¹²⁹ Code Civ. Proc. § 1233. In *Casey v. Dwyre*, 15 Hun, 153, special findings are confused with a special verdict.

¹³⁰ Volume 2, p. 2454.

¹³¹ *Seward v. Jackson*, 8 Cow. 409; *Eisemann v. Swan*, 19 Super. Ct. (6 Bow.) 668.

¹³² Rule 38 of General Rules of Practice.

¹³³ Volume 1, pp. 574, 576, 587, 609.

issues is by a referee appointed to hear and determine the issues is the same as where the trial is by the court without a jury.¹³⁴ “Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report.”¹³⁵ This Code section applies only to judgments in “actions.”¹³⁶ Furthermore, it does not apply to references to report the facts.¹³⁷ The phrase “except where it is otherwise expressly prescribed by law” includes matrimonial actions in which judgment must be rendered by the court.¹³⁸ The clerk has no power to enter an “interlocutory” judgment except after application to the court and a direction of the court so to do.¹³⁹

The old Code provided that judgment might be entered after the expiration of four days from the filing of the decision or report, and the service on the attorney for the adverse party of a copy thereof, and notice of the filing,¹⁴⁰ but the present

¹³⁴ See vol. 2, p. 2487. The judgment on the report of a referee is to be formally drawn up and entered, as though pronounced by the court in which the suit is pending. This has been the uniform practice under the new as well as under the old form of procedure. *Hancock v. Hancock*, 22 N. Y. 568.

¹³⁵ Code Civ. Proc. § 1228.

¹³⁶ Judgment cannot be entered on the report of a referee in a special proceeding, in the absence of a statute, without permission of the court. *Matter of Potter*, 44 Hun, 197.

¹³⁷ *Marcas v. Leony*, 50 Hun, 178, 2 N. Y. Supp. 831. See, also, *Bantes v. Brady*, 8 How. Pr. 216.

¹³⁸ In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made, as prescribed in section one thousand two hundred and fifteen of this act. Where a reference is made in such an action, the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court. Code Civ. Proc. § 1229.

¹³⁹ *Marcas v. Leony*, 50 Hun, 178, 2 N. Y. Supp. 831.

¹⁴⁰ Code Pro. §§ 267-272.

Code contains no like provision. The successful party may enter judgment immediately after filing the decision of the judge,¹⁴¹ or at any time thereafter;¹⁴² and a copy of the decision or report need not be served on the opposing attorney before judgment can be entered.¹⁴³ So, after decision, a draft of the judgment need not be served on the opposing party before its entry.¹⁴⁴

The basis of the judgment is the decision or report¹⁴⁵ which must direct the judgment to be entered thereon,¹⁴⁶ though if the report does not state the judgment to be rendered, the court at special term may settle the terms thereof in the absence of objections.¹⁴⁷ And the mere absence in the referee's report of a direction as to the judgment to be entered does not affect the validity of the judgment which has been entered in accordance with what from the report is clearly shown to have been the determination of the referee.¹⁴⁸

Furthermore, the provisions of the judgment must strictly conform to the decision or report,¹⁴⁹ and not contain any pro-

¹⁴¹ *Lynde v. Cowenhoven*, 4 How. Pr. 327.

¹⁴² *Roberts v. White*, 39 Super. Ct. (7 J. & S.) 272, 276.

¹⁴³ *Crook v. Crook*, 14 Daly, 298.

¹⁴⁴ *People v. Albany & S. R. Co.*, 57 Barb. 204.

¹⁴⁵ *Sommer v. Sommer*, 87 App. Div. 434, 84 N. Y. Supp. 444; *Hall v. Beston*, 13 App. Div. 116, 43 N. Y. Supp. 304; *Schultz v. Hoagland*, 9 Wkly. Dig. 319. The opinion of a judge, without formal findings or decision, is not enough to sustain entry of judgment. *Weyman v. National Broadway Bank*, 59 How. Pr. 331. Judgment cannot be entered on a decision which merely directs judgment without stating the facts found and the conclusions of law. *Newman v. Mayer*, 52 App. Div. 209, 65 N. Y. Supp. 294, 7 Ann. Cas. 497. Neither an entry in the minutes of the clerk nor an opinion of the court can take the place of the formal decision required by the Code. *Electric Boat Co. v. Howey*, 96 App. Div. 410, 89 N. Y. Supp. 210.

¹⁴⁶ See vol. 2, pp. 2381, 2459. See, also, *Clason v. Baldwin*, 36 State Rep. 982, 13 N. Y. Supp. 371.

¹⁴⁷ *Vagen v. Birngruber*, 9 State Rep. 729.

¹⁴⁸ *Matter of Baldwin*, 87 Hun, 372, 34 N. Y. Supp. 435.

¹⁴⁹ *Clark v. Clark*, 84 Hun, 362, 32 N. Y. Supp. 325. Where the decision is simply that judgment be entered for defendant and against plaintiff, an entry of judgment dismissing the complaint "on the merits," is unauthorized and will be amended. *Card v. Meincke*, 70 Hun,

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visions except those embraced in the decision or report.¹⁵⁰ Thus the judgment in an equity action upon the report of a referee must follow the report as to the allowance of costs; and a party who is not allowed costs by the report cannot insert them in the judgment.¹⁵¹ But where the prevailing party waives a provision in his favor in the conclusions of law, the special term may order entry of judgment on the decision in the modified form.¹⁵² And failure of the judgment to conform to the decision or report may be corrected on motion at special term.¹⁵³

On filing the report or decision, judgment may be entered by the clerk without further direction of the court.¹⁵⁴ But the usual practice, after the trial of issues of fact by a referee, and a report thereon, in the absence of an agreement between the attorneys for the respective parties as to the form of the judgment, is to have the same settled by the court.¹⁵⁵ And, in the first department, it has been held necessary that there be a direction of the court for the entry of a judgment on the report of a referee though the special term has no authority

382, 54 State Rep. 285, 24 N. Y. Supp. 375; *Petrie v. Trustees of Hamilton College*, 92 Hun, 81, 36 N. Y. Supp. 636. A judgment on a referee's report reciting only that part of the report which relates to one party, and adjudicating only on the rights of that party, although it contain a general clause adjudging that the report be in all things confirmed, cannot be regarded as adjudicating the rights of another party which were passed on by the report. *People v. Kent*, 58 How. Pr. 407, 4 Wkly. Dig. 62.

¹⁵⁰ *Loeschigk v. Addison*, 19 Abb. Pr. 169; *Brunner v. Kaempfer*, 2 App. Div. 177, 37 N. Y. Supp. 700.

¹⁵¹ *Coddington v. Bowen*, 2 Silv. Sup. Ct. 417, 24 State Rep. 832, 6 N. Y. Supp. 355. Decision of referee as to costs cannot be reviewed at special term. *Kennedy v. McKone*, 10 App. Div. 97, 41 N. Y. Supp. 577.

¹⁵² *Roberts v. White*, 39 Super. Ct. (7 J. & S.) 272.

¹⁵³ *Oliver v. French*, 82 Hun, 436, 31 N. Y. Supp. 740; *People v. Goff*, 52 N. Y. 434; *Campbell v. Seaman*, 63 N. Y. 568. Remedy is not by appeal. *Howland v. Howland*, 20 Hun, 472.

¹⁵⁴ *Roberts v. White*, 39 Super. Ct. (7 J. & S.) 272; *Clapp v. Hawley*, 97 N. Y. 610; *Union Bag & Paper Co. v. Allen Bros. Co.*, 94 App. Div. 595, 88 N. Y. Supp. 368.

¹⁵⁵ *Union Bag & Paper Co. v. Allen Bros. Co.*, 94 App. Div. 595, 88 N. Y. Supp. 368.

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to require the entry of a judgment substantially different from that prescribed in the report of the referee.¹⁵⁶ If difficulty is experienced in preparing a judgment in conformity with the decision or report, it is expedient to submit the judgment to the adverse party before its entry and then, if objection is made thereto, to move the court to settle the form of the judgment. Of course, if no objections are offered by the adverse party within a reasonable time, the successful party may procure the clerk to enter the judgment, leaving the attorneys for the adverse party to move to amend it if it does not conform to the decision or report.¹⁵⁷ The court may, on a less notice than eight days, settle the form of the judgment and direct the entry thereof.¹⁵⁸

The judgment need not reiterate the findings on particular issues.¹⁵⁹

— Form of judgment on decision.

[Title of cause.]

At a special term, etc.

This action having been brought to trial at a special term of this court, the Hon. ———, one of the justices of this court, presiding, and a decision therein having been rendered by the said justice for ———, and the said justice having made and filed his findings of fact and conclusions of law therein, wherein he finds that defendants are entitled to judgment, dismissing the plaintiff's complaint on the merits, with costs, and that the defendants are entitled to a decree adjudging that ———; and the defendants' costs having been adjusted at the sum of ——— dollars: Now, on motion of ———, attorney for ———,

It is adjudged and decreed that the complaint herein be, and the same hereby is, dismissed on the merits, with costs.

And it is further adjudged and decreed that defendants, ———, recover of ——— the sum of ——— dollars, their costs and disbursements taxed as aforesaid.

[Signature of clerk.]

¹⁵⁶ *Paget v. Melcher*, 26 App. Div. 12, 16, 49 N. Y. Supp. 922.

¹⁵⁷ See *Union Bag & Paper Co. v. Allen Bros. Co.*, 94 App. Div. 595, 88 N. Y. Supp. 368.

¹⁵⁸ *Parker v. Linden*, 59 Hun, 359, 13 N. Y. Supp. 95.

¹⁵⁹ Findings of judge. *Bunten v. Orient Mut. Ins. Co.*, 21 Super. Ct. (8 Bosw.) 448. Findings of referee. *Currie v. Cowles*, 30 Super. Ct. (7 Rob.) 3.

— Form of judgment on report of referee.

[Title of court and action.]

This action having been referred by an order entered herein on the — day of —, 190—, to —, to hear and determine the issues herein, and said referee, after a trial had on due notice to all the parties, having duly made and filed his report herein on the — day of —, 190—, stating his findings of facts and conclusions of law herein and directing the judgment to be entered, and the costs of — having been duly adjusted at — dollars: Now, on motion of —, attorney for —,

It is adjudged and decreed [state according to direction in report of referee]. [Signature of clerk.]

§ 1974. Judgment after trial of issue of law.

The decision on a demurrer usually directs the entry of an interlocutory judgment. An interlocutory, and not a final, judgment should be entered on a decision overruling a demurrer.¹⁶⁰ Of course, the judgment must be interlocutory if issues of fact remain to be disposed of.¹⁶¹ Thus, judgment should not be entered on overruling a demurrer to a counterclaim, on plaintiff's failure to reply, where the other issues have not been disposed of.¹⁶² So if the decision determines only a part of the grounds of demurrer, final judgment cannot be entered.¹⁶³ The decision must direct either an interlocutory or a final judgment, and if leave to amend or plead over is given it may direct what the final judgment shall be if the party fails to comply with the conditions.¹⁶⁴ Thus, the interlocutory judgment, entered on overruling a demurrer, may provide that if the defeated party fails to amend the

¹⁶⁰ *Romaine v. Brewster*, 10 Misc. 120, 30 N. Y. Supp. 948; *Funson v. Philo*, 27 Misc. 262, 58 N. Y. Supp. 419. Form of judgment, see *Smyth v. Graecen*, 96 App. Div. 182, 89 N. Y. Supp. 111.

¹⁶¹ *Seeley v. City of Amsterdam*, 54 App. Div. 9, 66 N. Y. Supp. 221; *Biershenk v. Stokes*, 46 State Rep. 179, 18 N. Y. Supp. 854.

¹⁶² *Bucking v. Hauselt*, 9 Hun, 633.

¹⁶³ *Robinson v. Hall*, 35 Hun, 214.

¹⁶⁴ If decision does not direct the final or interlocutory judgment to be entered, the remedy is by motion. *Nealon v. Frisbie*, 9 Misc. 660, 30 N. Y. Supp. 551.

complaint shall be dismissed on the merits.¹⁶⁵ When a demurrer to one of several defenses is sustained, the proper judgment thereon is for the plaintiff, unless the defendant succeeds on the remaining defenses, with leave to defendant to amend on terms.¹⁶⁶ Upon overruling plaintiff's demurrer to a separate defense to one of two causes of action set forth in the complaint, a direction for final judgment for the defendant upon such defense is proper, and although the judgment cannot be final until the issues as to the other cause of action are tried, it is correct to give direction for its entry so that it may be entered when the proper time arrives.¹⁶⁷ In a preceding volume,¹⁶⁸ the form and sufficiency of a decision on a demurrer has been considered.

Sections 1221 to 1223 of the Code provide for the judgment after a trial of an issue of law. Section 1221 provides that where one or more issues of law, and one or more issues of fact, arise in the same action, and all the issues have been tried, final judgment upon the whole issue must be taken, as follows:

1. Where an application must be made to the court, for judgment upon the issue last tried, the application must be for judgment upon the whole issue; and judgment must be rendered accordingly.

2. Where the action is triable by a jury, and the issue last tried is tried at a term of the court, the application for judgment, upon the whole issue, may be entertained, in the discretion of the court, at that term, and with or without notice; if not so entertained, it must be heard as a motion.

3. Where the issue last tried is tried before a referee, his report must award the proper judgment upon the whole issue, unless otherwise prescribed in the order of reference. But the referee is not required to refer in his report to the judg-

¹⁶⁵ *Hommert v. Gleason*, 38 State Rep. 342, 20 Civ. Proc. R. (Browne) 349, 14 N. Y. Supp. 568.

¹⁶⁶ *Murphy v. Allerton*, 7 Hun. 650.

¹⁶⁷ *Crasto v. White*, 52 Hun. 473, 5 N. Y. Supp. 718.

¹⁶⁸ Volume 1, p. 1014.

ART. II. Nature of Issue, etc.—After Trial of Issue of Law

ment already given by the court on the issue of law.¹⁶⁹ If final judgment is awarded in a referee's report after a trial of other issues, he may assess the damages.¹⁷⁰

Section 1222 provides that final judgment upon an issue of law, where no issue of fact remains to be tried, and final judgment has not been directed as prescribed in section ten hundred and twenty-one of the Code, may be entered upon application to the court, or by the clerk in an action specified in section four hundred and twenty of the Code. This Code section provides for the mode of taking final judgment, after interlocutory judgment, where the decision on the demurrer, directing an interlocutory judgment, does not contain any provisions as to final judgment, and no issue of fact remains to be tried. It is applicable to a case where judgment has been rendered on a demurrer, relating to the entire merits, in either a legal or an equitable action. If leave to enter final judgment on the failure to comply with the terms of the interlocutory judgment is not given by the decision, application for leave to enter it must be made upon a motion.¹⁷¹ Damages are ascertained as on a default and may be assessed by the clerk if the complaint demands judgment for a sum of money only and the action is one for breach of an express contract to pay, absolutely or on a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only, or is based on an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person.¹⁷² Section 1021, herein referred to, provides that if the decision directs an interlocutory judgment, with leave to the party in fault to plead anew or amend or permitting the action to be divided into two or more actions and no other issue remains to be disposed of, it may also direct the final judgment to be entered

¹⁶⁹ Breckenridge Co. v. Perkins, 14 App. Div. 629, 43 N. Y. Supp. 890.

¹⁷⁰ Code Civ. Proc. § 1223.

¹⁷¹ Code Civ. Proc. § 1230; *Liegeois v. McCrackan*, 22 Hun, 69.

¹⁷² Code Civ. Proc. § 420, as referred to in § 1222.

 Art. II. Nature of Issue, etc.—After Trial of Issue of Law.

if the party in fault fails to comply with any of the directions given or terms imposed.¹⁷³

Section 1223 provides that on an application, by either party, to the court, for final judgment, after the decision of an issue of law, as prescribed in the two preceding sections, the court has the powers specified in section one thousand two hundred and fifteen of the Code, on an application by plaintiff for judgment by default. Where final judgment may be awarded in a referee's report, as prescribed, the referee may make a computation, or an assessment, or take an account, or proof of a fact, for the purpose of enabling him to award the proper judgment, or enabling the court to carry it into effect; and he may ascertain and fix the damages, as a jury may do, upon the execution of a writ of inquiry.

The Code provides that the interlocutory judgment may award costs, either absolutely or to abide the event, although issues of fact remain to be tried.¹⁷⁴ Late cases hold, however, that judgment on a demurrer should not permit the collection of costs before a trial of the whole issue.¹⁷⁵

The practice of entering a second or supplemental judgment on an interlocutory judgment overruling a demurrer to the complaint is unauthorized.¹⁷⁶

— Form of order under section 1222.

[Title of cause.]

At a special term, etc.

This action having been duly brought to trial on the issue of law herein formed by plaintiff's complaint and defendant's demurrer, at a

¹⁷³ Necessity of application to the court, see *Swan v. Mutual Reserve Fund Life Assn.*, 22 Misc. 211, 50 N. Y. Supp. 46; *Smith v. Rathbun*, 88 N. Y. 569; *Hoe & Consol. Gold Min. Co. v. O'Neill*, 23 Civ. Proc. R. (Browne) 144, 51 State Rep. 435, 22 N. Y. Supp. 139; *Flatow v. Van Bruntzen*, 44 State Rep. 362, 17 N. Y. Supp. 506.

¹⁷⁴ Code Civ. Proc. § 5232. *Tallman v. Bernhard*, 75 Hun. 30, 27 N. Y. Supp. 6.

¹⁷⁵ *Burrell v. Burrell*, 86 App. Div. 286, 83 N. Y. Supp. 769; *Doyle v. Fritz*, 86 App. Div. 515, 83 N. Y. Supp. 762; *Fales v. Globe Knitting Co.*, 51 Hun. 487, 4 N. Y. Supp. 281; *Oesterreich v. Jones*, 45 Hun. 246.

¹⁷⁶ *Crichton v. Columbia Ins. Co.*, 81 App. Div. 614, 81 N. Y. Supp. 363.

ART. II. Nature of Issue, etc.

special term, held by —, one of the justices of this court, who, having heard the parties, by their counsel, duly made and filed his decision directing the entry of an interlocutory judgment overruling the demurrer but granting leave to the defendant, on payment of costs, to withdraw his demurrer and answer over, within — days after the service of said interlocutory judgment on his attorneys, and a copy of said interlocutory judgment having been duly served on —, attorney for —, more than twenty days since and defendant not having elected to answer within said time: Now, on motion of —, attorney for —,

Ordered, that final judgment be entered in favor of plaintiff against defendant for the amount of damages sustained on account of the cause of action mentioned in the complaint, and that said damages be assessed by a jury and that a writ of inquiry for that purpose be issued to the sheriff of — county.

§ 1975. Judgment after trial of specific questions of fact— By jury.

The Code (section 1225) provides that in an action triable by the court, where one or more specific questions of fact, arising on the issues, have been tried by a jury, judgment may be taken, on the application of either party, as follows:

1. If all the issues of fact in the action are determined by the findings of the jury, or the remaining issues of fact have been determined by the decision of the court, or the report of a referee, an application for judgment, on the whole issue may be made as on a motion. On such motion both parties have a right to be heard, and the court may order judgment on the case as then made, or may set aside the findings of the jury, or use some of them, or may allow either party to give further evidence. If the motion for judgment be not at once made, it must be brought on on notice so that both parties may be heard.¹⁷⁷

2. If one or more issues of fact remain to be tried, judgment may be rendered on the whole issue at the term of the court where, or by direction of the referee by whom, they are tried.¹⁷⁸ If the findings of the jury, together with the facts

¹⁷⁷ *Boller v. Boller*, 96 App. Div. 163, 89 N. Y. Supp. 200.

¹⁷⁸ Code Civ. Proc. § 1225. When issues may be framed for jury, see vol. 2. §§ 1650, 1651.

 Art. II. Nature of Issues, etc.—After Trial of Specific Questions.

admitted in the pleadings, do not cover the whole case and other issues remain to be tried, or other facts requisite for equitable relief remain to be proved, then the case must be regularly brought to a hearing before the court, when it may or may not adopt the findings of the jury, and other facts may be proved, and in such case the court must make findings of fact and of law.¹⁷⁹

— **By referee.** Where a reference has been made, to report upon one or more specific questions of fact, arising upon the issue, and the remaining issues have been tried, judgment must be taken, upon the application of either party, as prescribed in section 1221 of the Code.¹⁸⁰ The motion for final judgment is usually made in connection with, and as a part of, the motion to confirm the report.¹⁸¹

§ 1976. Judgment after hearing at appellate division.

Certain Code provisions as to the judgment to be rendered by the appellate division are proper to be considered in this connection.

— **On affirmance on appeal.** The Code provides that when an order or judgment is wholly or partly affirmed upon an appeal to the appellate division of the supreme court and no issue of fact remains to be tried, the appellate division may, in its discretion, render final judgment, unless it permits the appellant to amend or plead over.¹⁸² This provision applies to the affirmance of an interlocutory judgment rendered on a demurrer.

— **On denial of motion for new trial.** Where a motion for a new trial, made at the first instance at a term of the appellate division of the supreme court, is denied, judgment may be taken, as if the motion had not been made, after the expiration of four days from the entry of the order and the

¹⁷⁹ *Hammond v. Morgan*, 191 N. Y. 179, 186, 187.

¹⁸⁰ Code Civ. Proc. § 1221. See ante § 1974. See, also, vol. 2, p. 2488.

¹⁸¹ For form of notice of application, see 2 Abbott, New Pr. & F. p. 871.

¹⁸² Code Civ. Proc. § 1224. That this provision applies to a reversal, see *Flafow v. Van Buren*, 14 State Rep. 392, 17 N. Y. Supp. 506.

Art. II. Nature of Issue, etc.—After Hearing at Appellate Division.

service, upon the attorney for the adverse party, of a copy thereof and notice of the entry; but not before.¹⁸³ Under a like Code provision now repealed it was held that four full calendar days must elapse before judgment can be properly entered.¹⁸⁴ But it would seem that irregularity in entering judgment before the expiration of four days is not ground for setting aside the judgment where the party against whom the judgment was rendered has not been prejudiced thereby.¹⁸⁵

— **On verdict subject to opinion of court.** A motion for judgment, upon a verdict subject to the opinion of the court, may be made by either party, and must be heard and decided at a term of the appellate division of the supreme court.¹⁸⁶ The motion is an enumerated one and is argued on a printed case which must be made by the party in whose favor judgment is directed.¹⁸⁷

§ 1977. Final judgment after entry of interlocutory judgment.

In a case, not provided for in sections 1212 to 1229, inclusive, of the Code, where the decision, upon a trial by the court, without a jury, or the report, upon a trial by a referee, directs an interlocutory judgment to be entered, and the party afterwards becomes entitled to a final judgment, an application for the latter may be made, as upon a motion. And where a judgment requires the appointment of a referee, to do any act thereunder, the referee must be appointed by the judgment or by the court, upon motion, except as otherwise prescribed in section 1231 of the Code.¹⁸⁸ In an action triable by the court, an interlocutory judgment, rendered upon a default in appearing or pleading, or pursuant to the direction contained in

¹⁸³ Code Civ. Proc. § 1227.

¹⁸⁴ *Marvin v. Marvin*, 75 N. Y. 240.

¹⁸⁵ *Kidd v. Phillips*, 45 Super. Ct. (13 J. & S.) 633 (mem.).

¹⁸⁶ Code Civ. Proc. § 1234. When verdict may be directed subject to opinion of court, see vol. 2, § 1760.

¹⁸⁷ *Luce v. Morison*, 2 Month. Law Bul. 95.

¹⁸⁸ Code Civ. Proc. § 1230.

Art. III. Entry.

a decision or report, may state the substance of the final judgment to which the party will be entitled. It may also direct that the final judgment be settled by a judge or a referee. In that case, final judgment shall not be entered, until a settlement thereof, subscribed by the judge or referee, is filed. Where an interlocutory judgment awards costs, they may be awarded generally without specifying the amount thereof. Where the final judgment is directed to be settled, and the costs have not been taxed when the settlement thereof is filed, a blank for the amount of the costs must be left in the settlement, and the costs must be taxed, and the blank filled up accordingly, by the clerk, when the final judgment is entered.¹⁸⁹ This section of the Code is not mandatory.¹⁹⁰

ART. III. ENTRY.

§ 1978. General considerations.

The entry of a judgment is to be distinguished from the rendition of judgment. The latter is the judicial act of the court in pronouncing the sentence of the law on the facts in controversy as ascertained by the pleadings and the verdict. The entry of a judgment is the ministerial act of spreading on record such statement. The Code provisions regulating the mode of entering judgment and the making up and filing a judgment roll are not mandatory but are merely directory.¹⁹¹ A clerk, on being tendered his fee for entering judgment, must enter it although a fee for a previous service rendered remains unpaid by either party.¹⁹²

§ 1979. What constitutes entry.

The Code provides as follows: "Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the

¹⁸⁹ Code Civ. Proc. § 1231; *Kerr v. Diddie*, 14 Civ. Proc. R. (Browne) 176, 186.

¹⁹⁰ *Heldtethwaite v. Flint*, 83 App. Div. 162, 82 N. Y. Supp. 471.

¹⁹¹ *Stimson v. Higgins*, 16 Barb. 658, 660.

¹⁹² *Purdy v. Peters*, 15 Abb. Pr. 160.

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entry of the judgment. The clerk shall, in addition to the docket books required to be kept by law, keep a book styled the 'judgment book' in which he shall record all judgments entered in his office.¹⁹⁹ The judgment must be signed at the time of the filing.¹⁹⁴ The endorsement "filed," etc., is not a signing.¹⁹⁵ It seems that the omission to sign a judgment, however, does not render the judgment void, though irregular and amendable.¹⁹⁶ Legal and equitable relief do not require different judgment books nor different modes of entry. And an irregularity or departure from the usual practice in entering a judgment in a book kept for entering judgments in legal actions instead of the book for equitable actions the court below can disregard or correct, and its action thereon is final.¹⁹⁷ It has been held that it is irregular for the clerk to sign a judgment record in blank as to the amount of damages.¹⁹⁸

Where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken by special provision of law, a memorandum of the party's death must be entered with the judgment in the judgment book.¹⁹⁹

§ 1980. When and where judgment may be entered.

The Code provides that "judgment may be entered in term or vacation."²⁰⁰ It also provides that "a judgment must be entered, in the first instance, pursuant to the direction of the court, at a term held by one judge; except where special pro-

¹⁹³ Code Civ. Proc. § 1236.

¹⁹⁴ Judgment set aside where more than two months had elapsed *Manning v. Guyon*, 1 Code R. 43.

¹⁹⁵ *Manning v. Guyon*, 1 Code R. 43.

¹⁹⁶ *Good v. Daland*, 119 N. Y. 153; *Van Alstyne v. Cook*, 25 N. Y. 489, 490.

¹⁹⁷ *Whitney v. Townsend*, 67 N. Y. 40.

¹⁹⁸ *Frost v. Flint*, 2 How. Pr. 125.

¹⁹⁹ Code Civ. Proc. § 1210. See, also, Code Civ. Proc. § 763. Omission of memorandum of death may, however, be corrected. *Matter of Miller*, 70 Hun. 61, 23 N. Y. Supp. 1104.

²⁰⁰ Code Civ. Proc. § 1202. Entry during business hours, see post, § 1941.

ART. III. Entry

vision is otherwise made by law. If notice of an application for judgment is not required, and an order for a judgment is made by a judge out of court, the judgment may be entered with the same force and effect as if granted in court.¹²⁰¹

An entry of judgment is irregular where made, without notice, after the disbarment of defendant's attorney, since section 65 of the Code provides that if an attorney becomes disabled to act at any time before judgment, no further proceedings shall be taken against his client until thirty days after notice to the client to appoint another attorney has been given.¹²⁰²

§ 1981. Who may obtain entry of judgment.

Ordinarily the successful party attends to the entry of judgment. But the court may, instead of compelling a successful party by an action to enter formal judgment, direct that unless judgment is so entered within a specified time the defeated party may enter it.¹²⁰³ And where defendant declines to enter final judgment dismissing the complaint upon demurrer, plaintiff is entitled to enter it, although the costs of previous proceedings have not been paid.¹²⁰⁴

§ 1982. Adjustment of costs and computation of interest as conditions precedent.

The clerk must adjust the costs and disbursements of the prevailing party and the interest accrued on the verdict before he can enter judgment.¹²⁰⁵ The Code provides that where

¹²⁰¹ Code Civ. Proc. § 1204. The last sentence was added by amendment in 1900. The phrase "except where special provision is made by law" refers to entry of judgment after the decision of the appellate division.

¹²⁰² *Commercial Bank v. Poliz*, 43 N. Y. Supp. 985, 13 App. Div. 603.

¹²⁰³ *Wilson v. Simpson*, 84 N. Y. 674, *Thompson v. Schieffelin*, 4 Civ. Proc. R. (Bronx) 270.

¹²⁰⁴ *Ten Eyck v. Town of Warwick*, 63 State Rep. 165, 24 Civ. Proc. R. (Suff.) 6, 26 N. Y. Supp. 859.

¹²⁰⁵ *Lentillon v. City of New York*, 5 Super Ct. (3 Sandf.) 721. This matter is treated of fully in the chapter on costs. Entry must show

final judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest on the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment.²⁰⁰ It is common practice to insert the amount of interest as an item in the bill of costs.

The Code also provides that when final judgment for plaintiff is rendered in an action to recover damages for death by wrongful act, the clerk must add, to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report, or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.²⁰⁷ It seems that the fact that the jury has included interest does not obviate the necessity of the clerk also adding interest, but in such case the remedy of defendant is to move to set aside the verdict.²⁰⁸

§ 1983. Effect of informality in entering judgment.

In a court of record where a verdict, report, or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of an informality in entering judgment or making up the judgment roll.²⁰⁹ Rule 19 of the General Rules of Practice forbidding a clerk to file a paper in which the folios are not

amount of costs. *Mason v. Corbin*, 29 App. Div. 602, 51 N. Y. Supp. 178.

²⁰⁰ Code Civ. Proc. § 1235. See, also, *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 55, and *Van Dolsen v. Abendroth*, 53 Super. Ct. (21 J. & S.) 35, as to mode of raising objections to erroneous allowance or computation of interest.

²⁰⁷ Code Civ. Proc. § 1904. This provision does not apply where judgment is based on a statute of another state. *Frounfelker v. Delaware, L. & W. R. Co.*, 73 App. Div. 350, 76 N. Y. Supp. 745.

²⁰⁸ *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664 (mem.).

²⁰⁹ Code Civ. Proc. § 721, subd. 11.

Art. III. Entry.

numbered does not invalidate the entry of a judgment, the folios of which are not numbered.²¹⁰

§ 1984. Entry nunc pro tunc.

The power to enter a judgment nunc pro tunc is inherent in the court and is properly exercised when the omission to render such judgment at the proper time was caused by the act of court, or by its failure to act, or by an act of the opposing party; in other words, where the delay is not caused by any neglect or laches of the prevailing party.²¹¹ Thus, judgment against a party who dies after verdict and before judgment may be entered nunc pro tunc as of the date of the verdict.²¹² And it seems that where, after a decision and before entry of judgment thereon, a statute goes into effect which would have rendered the judgment erroneous, had it been in force at the time of the decision, the court will allow the judgment to be entered as of the date of the decision.²¹³

§ 1985. Notice of entry.

In order to limit the time within which an appeal may be taken to the appellate division of the supreme court, there must be served on the attorney for the defeated party a copy of the judgment appealed from and a written notice of the entry thereof.²¹⁴ The sufficiency of the notice and service will be considered in the volume relating to appellate practice. Service of notice of the entry of judgment to start the time running within which the attorney for the adverse party may file exceptions to the decision or report has already been considered.²¹⁵

²¹⁰ *New York City Baptist Mission Soc. v. Tabernacle Baptist Church*, 40 N. Y. Supp. 1032, 17 Misc. 732; *Id.*, 41 N. Y. Supp. 976, 10 App. Div. 288, 75 State Rep. 1252.

²¹¹ 18 Enc. Pl. & Pr. 459.

²¹² *Long v. Stafford*, 103 N. Y. 274.

²¹³ *Miller v. O'Kain*, 5 Hun, 39.

²¹⁴ Code Civ. Proc. § 1351.

²¹⁵ Volume 2, p. 2384.

Art. IV. Judgment Roll.

— Form of notice of entry of judgment.

[Title of court and cause.]

You will please take notice that judgment herein was duly entered in the office of the clerk of the ——— on the ——— day of ———, 190—, in favor of the ——— and against the ——— for the sum of ———.

[Date.]

[Signature and address of attorney.]

[Address to opposing attorney.]

ART. IV. JUDGMENT ROLL.

§ 1986. Code provisions.

The necessary contents of a judgment roll is prescribed by section 1237 of the Code; the person to prepare it is named in section 1238; and the noting of the time of filing is prescribed by section 1239.

§ 1987. Necessity of filing.

A proceeding to enforce or collect a final judgment cannot be taken until the judgment roll is filed.²¹⁶

§ 1988. Time for filing.

The Code provides that the roll must be filed by the clerk "immediately" after he enters final judgment.²¹⁷ In practice the roll is not usually made up and filed until the costs are adjusted and the party is prepared to have the judgment perfected and docketed.²¹⁸ If the judgment roll is not filed before a judgment is docketed, and execution is issued, the court may require the defect to be supplied within a reasonable time, and set aside the execution for failure to comply.²¹⁹ A judgment roll is irregular if made up without having made an entry in the judgment book.²²⁰

— **Indorsement of time of filing.** The clerk must make a minute, upon the back of each judgment roll, filed in his office,

²¹⁶ Code Civ. Proc. § 1239.²¹⁷ Code Civ. Proc. § 1237.²¹⁸ *Stimson v. Huggins*, 16 Barb. 659.²¹⁹ *Blashfield v. Smith*, 27 Hun, 114.²²⁰ *Schenectady & S. Plank Road Co. v. Thatcher*, 6 How. Pr. 226.

of the time of filing it, specifying the year, month, day, hour, and minute.²²¹

§ 1989. By whom prepared.

The judgment roll must be prepared and furnished to the clerk by the attorney for the party at whose instance the final judgment is entered, except that the clerk must attach thereto the necessary original papers on file. But the clerk may, at his option, make up the entire judgment roll.²²²

§ 1990. Signature.

There is no Code provision requiring the clerk to sign the roll though it is usual for him to do so. But even if necessary, the omission to sign does not affect the validity of the judgment,²²³ especially where the clerk has signed the minutes of the court.²²⁴

§ 1991. Contents.

The judgment roll "must consist, except where special provision is otherwise made by law, of the following papers: The summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits or necessarily affects the judgment."^{224a} If judgment is taken by default, the judgment roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor, together with any report, decision, or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment roll must contain the verdict, report, or decision;

²²¹ Code Civ. Proc. § 1239.

²²² Code Civ. Proc. § 1238. *Knapp v. Roche*, 82 N. Y. 366.

²²³ *Artisans' Bank v. Treadwell*, 34 Barb. 553. The old Code did not expressly require such signature. *Goelet v. Spofford*, 55 N. Y. 647.

²²⁴ *Lythgoe v. Lythgoe*, 75 Hun, 147, 151, 26 N. Y. Supp. 1063.

^{224a} Order striking out an answer as frivolous is not such an order. *Goldstein v. Michelson*, 45 Misc. 599, 91 N. Y. Supp. 32.

each offer, if any, made as prescribed in this act, and the exceptions or case then on file.²²⁵ This Code provision requires what, under the practice prior to the Code, was supplied by the copy minutes of trial. The roll need not include an original pleading where superseded by an amended one;²²⁶ the items of costs, as adjusted by the clerk, and the affidavit of disbursements;²²⁷ the conclusion of a referee not incorporated in his report;²²⁸ the report of a referee where it has been sent back and a new one made;²²⁹ nor the order of court directing the issues of fact in an equity suit to be tried by a jury.²³⁰ And where two trials have been had, the case made on the first need not be included.²³¹ But where a demurrer to a complaint is overruled and defendant answers over, and trial is had on the issues, and judgment rendered, the demurrer and the order overruling it and any proceedings on appeal from the order which involve the merits, are proper parts of the judgment roll, as defendant may desire to review the order.²³² A judgment roll should not show anything more than a final decision of the matters litigated.²³³ A bill of exceptions attached to the judg-

²²⁵ Code Civ. Proc. § 1237. In replevin other papers must be made a part of the judgment roll, under Code Civ. Proc. § 1717. A notice of trial should not be included. *Sweeny v. Kellogg*, 96 App. Div. 399, 89 N. Y. Supp. 314.

²²⁶ *Thornton v. St. Paul & C. R. Co.*, 6 Daly, 511; *Goldstein v. Michelson*, 91 N. Y. Supp. 32. The original answer, which has been superseded by an amended answer, and the order directing the substitution, are not properly to be included in the judgment roll, and the fact that the order contains a provision saving the rights of the plaintiff to costs or disbursements occasioned by the original answer makes no difference where the order was merely filed and not presented to the trial judge. *Dexter v. Dustin*, 70 Hun, 515, 53 State Rep. 673, 24 N. Y. Supp. 129.

²²⁷ *Schenectady & S. Plank Road Co. v. Thatcher*, 6 How. Pr. 226; *Cook v. Dickerson*, 8 Super. Ct. (1 Duer) 679.

²²⁸ *Fox v. McComb*, 44 State Rep. 178, 17 N. Y. Supp. 783.

²²⁹ *Lyddy v. Chamberlain*, 24 Hun, 377.

²³⁰ *Lythgoe v. Lythgoe*, 75 Hun, 147, 26 N. Y. Supp. 1063.

²³¹ *Wilcox v. Hawley*, 31 N. Y. 648.

²³² *Thornton v. St. Paul & C. R. Co.*, 6 Daly, 511.

²³³ *Kipper v. Sizer*, 2 State Rep. 386.

ment roll becomes a part of the roll.²³⁴ A memorandum of the death of a party must be indorsed on the judgment roll where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken by special provision of law.²³⁵

If judgment is taken by default, the roll must contain, *inter alia*, proof of due and timely service of the summons,²³⁶ but need not contain an award of execution against the person,²³⁷ nor, in an action on a note, show on its face that the note was produced to the clerk and that he assessed the amount due.²³⁸

— **Summons.** If defendant has appeared in the action, it is not necessary to attach the summons or proof of service to the roll.²³⁹

— **Bill of particulars.** A bill of particulars is not a part of the judgment roll²⁴⁰ and should not be annexed except for special and satisfactory reasons.²⁴¹

— **Notice of exceptions.** If the notice of exception to a ruling made after the cause is finally submitted, by a judge or referee on a trial without a jury, is filed before the entry of final judgment, it must be inserted in the judgment roll but if filed afterwards, it must be annexed to the judgment roll.²⁴²

§ 1992. Effect of omission to insert proper papers.

A judgment is not void because the judgment roll does not contain all the proper papers,²⁴³ nor is such fact ground of

²³⁴ *Schenectady & S. Plank Road Co. v. Thatcher*, 6 How. Pr. 226.

²³⁵ Code Civ. Proc. § 1210.

²³⁶ *Macomber v. City of New York*, 17 Abb. Pr. 35.

²³⁷ *Cooney v. Van Rensselaer*, 1 Code R. 38.

²³⁸ *American Exch. Bank v. Smith*, 6 Abb. Pr. 1.

²³⁹ *Smith v. Holmes*, 19 N. Y. 271; *Dean v. Roseboom*, 12 Wkly. Dig. 123; *Burnell v. Weld*, 76 N. Y. 103.

²⁴⁰ *Arrow S. S. Co. v. Bennett*, 23 Civ. Proc. R. (Browne) 234, 26 N. Y. Supp. 948.

²⁴¹ *Putney v. Tyng*, 1 State Rep. 760.

²⁴² Code Civ. Proc. § 994.

²⁴³ Code Civ. Proc. § 721, subd. 11; *Renouil v. Harris*, 4 Super. Ct. (2 Sandf.) 641; *Cook v. Dickerson*, 8 Super. Ct. (1 Duer) 679; *Miller v. White*, 59 Barb. 434.

 Art. V. Docketing and Lien Created Thereby.

reversal on appeal,²⁴⁴ but the remedy is by a motion to insert them.²⁴⁵ The court may, in order to supply an accidental omission, amend a judgment roll *nunc pro tunc*, by allowing the officer before whom the affidavit of default was sworn to, to sign the jurat thereto.²⁴⁶ So the affidavit of service of summons has been allowed to be attached to the judgment roll *nunc pro tunc*.²⁴⁷

ART. V. DOCKETING AND LIEN CREATED THEREBY.

§ 1993. Code provisions.

Article three of title one of chapter eleven of the Code relates to the docketing of a judgment and the lien created thereby. The Code article applies, however, only to a judgment, wholly or partly for a sum of money, or directing the payment of a sum of money, and to an execution issued upon such a judgment.²⁴⁸

§ 1994. Judgments which may be docketed.

A judgment cannot be docketed unless it is wholly or partly for a sum of money, or it directs the payment of a sum of money.²⁴⁹ But the fact that a judgment directs payment within five days after the service of a copy does not make it undocketable.²⁵⁰ It has been said that the test of the right to docket a judgment is the right to issue execution on it immediately.²⁵¹

²⁴⁴ *Gerity v. Seeger & Guernsey Co.*, 163 N. Y. 119.

²⁴⁵ *Breckenridge Co. v. Perkins*, 14 App. Div. 629, 43 N. Y. Supp. 809. Failure to include verdict in judgment roll is not ground for setting aside the judgment. An amendment may be allowed. *Overton v. National Bank of Auburn*, 3 State Rep. 169; *Matter of Miller*, 70 Hun, 61, 23 N. Y. Supp. 1104.

²⁴⁶ *Fawcett v. Vary*, 59 N. Y. 597.

²⁴⁷ *Lindsley v. Van Cortlandt*, 67 Hun. 145, 147, 149, 22 N. Y. Supp. 222.

²⁴⁸, ²⁴⁹ Code Civ. Proc. § 1272.

²⁵⁰ *Harris v. Elliott*, 163 N. Y. 269, 274.

²⁵¹ *De Agreda v. Mantel*, 1 Abb. Pr. 130.

§ 1995. Docket book.

The Code provides that each county clerk and the clerk of the city court of the city of New York, must keep one or more books, ruled in columns, convenient for making the prescribed entries, in which he must docket, in its regular order, and according to its priority, each judgment, which he is required to docket by article three of title one of chapter eleven of the Code.²⁵² The "docket book" required to be kept by this Code provision is a distinct book from the "judgment book" required by section 1236 to be kept so that an entry in the latter does not, of itself, create a lien.²⁵³ Where an action is brought against an executor or administrator personally and also in his representative capacity, or where costs to be collected out of his individual property are awarded in an action by or against him in his representative capacity, so much of the judgment as awards a sum of money against him personally may be separately docketed and a separate execution may be issued thereon as if the judgment contained no award against him in his representative capacity.²⁵⁴

— **Contents.** The Code provides in section 1246 that such clerk must, "when he files a judgment roll, on a judgment rendered in a court of which he is clerk, docket the judgment, by entering, in the proper docket book, the following particulars, under the initial letter of the surname²⁵⁵ of the judgment debtor, in its alphabetical order:

1. The name, at length, of the judgment debtor;²⁵⁶ and also

²⁵² Code Civ. Proc. § 1245.

²⁵³ *Sheridan v. Linden*, 81 N. Y. 182.

²⁵⁴ Code Civ. Proc. § 1816.

²⁵⁵ A purchaser of lands in good faith is not bound by a judgment against a former owner which is docketed by another name and under a different letter of the alphabet from that used in the chain of title. *Nagle v. Junker*, 17 Wkly. Dig. 428. Each judgment should be entered under the surname initial of the debtor; and entering a judgment against A. B. under A. is not a substantial compliance. The fact that it was the clerk's error does not avail the party. *Buchan v. Sumner*, 2 Barb. Ch. 165.

²⁵⁶ It is not sufficient to docket a judgment under a fictitious Christian name. *Bernstein v. Schoenfeld*, 81 App. Div. 171, 81 N. Y. Supp. 11.

Art. V. Docketing and Lien Created Thereby.—Docket Book.

his residence, title, and trade or profession, if any of them are stated in the judgment.

2. The name of the party, in whose favor the judgment was rendered.

3. The sum, recovered or directed to be paid, in figures.

4. The day, hour, and minute, when the judgment roll was filed.

5. The day, hour, and minute, when the judgment was docketed in his office.

6. The court in which the judgment was rendered, and if it was rendered in the supreme court, the county where the judgment roll is filed.

7. The name of the attorney for the party recovering the judgment.

If there are two or more judgment debtors, those entries must be repeated under the initial letter of the surname of each.²⁵⁷ There need not, however, be a strict literal compliance in every particular with the Code requirements as to the contents of the docket, in order that the judgment may be a lien on lands as against other incumbrances.²⁵⁸ A judgment which the county clerk in docketing omitted to index against the judgment debtor does not become a lien upon his real estate, and the judgment creditor for that reason cannot issue execution upon it by leave of the court at the expiration of a year from the death of the judgment debtor.²⁵⁹ Omissions and variances in docketing judgments, where they work no prejudice, are immaterial.²⁶⁰ The special term has

But the omission of a middle initial from the name of a judgment debtor in the docket and entry of a judgment does not affect the validity of the judgment, or prevent it from becoming a lien against subsequent purchasers in good faith, since the law recognizes but one Christian name. *Clute v. Emmerich*, 26 Hun, 10; *Geller v. Hoyt*, 7 How. Pr. 265.

²⁵⁷ Judgment for interlocutory costs may be entered against part of defendants separately. *Fox v. Muller*, 31 Misc. 470, 64 N. Y. Supp. 388.

²⁵⁸ *Sears v. Burnham*, 17 N. Y. 445.

²⁵⁹ *Le Fevre v. Phillips*, 81 Hun, 232, 30 N. Y. Supp. 709.

²⁶⁰ Thus a mistake in the date in the docket may be disregarded as against a creditor by a judgment later than either date, and who

Art. V. Docketing and Lien Created Thereby.—Docket Book.

power to amend the docket of a judgment *nunc pro tunc* so as to conform it to the judgment given by the court.²⁶¹

Where a judgment has been taken against persons jointly indebted, on a service of summons on only a part of them, the clerk with whom the judgment roll is filed, must write upon the docket, opposite or under the name of each defendant upon whom the summons was not served, the words, "not summoned"; and a like entry must be made by each county clerk, with whom the judgment is afterwards docketed.²⁶²

A memorandum of the death of a party must be noted on the margin of the docket of the judgment where a judgment for a sum of money or directing the payment of money is entered against a party after his death.²⁶³

—**Dockets to be public.** A docket book, kept by a clerk, must be kept open during the business hours fixed by law, for search and examination by any person.

§ 1996. Transcripts of the docket.

A clerk, with whom a judgment roll is filed, upon a judgment duly docketed, must furnish to any person applying therefor and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk, to whom such a transcript is presented must, upon payment of his fees therefor, immediately file it, and docket the judgment in the appropriate docket book, kept in his office.²⁶⁴

is not shown to be prejudiced by the error. *Sears v. Burnham*, 17 N. Y. 442.

²⁶¹ *Bordell v. Bordell*, 10 Wkly. Dig. 528.

²⁶² Code Civ. Proc. § 1925.

²⁶³ Code Civ. Proc. § 1210.

²⁶⁴ Code Civ. Proc. § 1247. Sufficiency of transcript, see *People v. Keenan*, 31 Hun. 625.

Art. V. Docketing and Lien Created Thereby.

— Form of transcript.

Names of Parties against whom Judgments have been obtained.		Names of Parties in whose favor Judgments have been drawn.	
Damages and Costs.	Time of Filing.	Attorney's Name.	
	at o'clock and min. M.		

Clerk's Office, New York, ———.

I certify that the foregoing is a correct transcript from the docket of judgments kept in my office.

———, Clerk.

§ 1997. Docketing transcript of judgment of justice of the peace.

A justice of the peace who renders a judgment, except in an action to recover a chattel, must, upon the application of the party in whose favor the judgment was rendered, and the payment of the fee therefor, deliver to him a transcript of the judgment. The county clerk of the county in which the judgment was rendered must, upon the presentation of the transcript and payment of the fee therefor, if within six years after the rendering thereof, indorse thereupon the date of its receipt, file it in his office, and docket the judgment as of the time of the receipt of the transcript in the book kept by him for that purpose, as prescribed in article third, title first of chapter eleven of the Code. Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section thirty hundred and forty-three of the Code, and that the judgment is not a lien upon, and cannot be enforced against, real property, unless it is for twenty-five dollars or more.

Art. V. Docketing and Lien Created Thereby.

exclusive of costs.²⁶⁵ A transcript of a justice's judgment issued for the purpose of filing in the office of the county clerk need not recite jurisdictional facts.²⁶⁶ Where the transcript is filed with the county clerk, the county court has power to thereafter vacate the transcript and judgment entered thereon in the county court and the execution issued on the same.²⁶⁷ The lien is not extinguished by the lapse of six years which the Code fixes as the limitation on an action on the judgment.²⁶⁸

§ 1998. Effect of failure to docket.

Docketing is unnecessary except to create a lien on lands.²⁶⁹ A judgment is never a lien on real property until docketed.²⁷⁰

— **Penalty for clerk's neglect.** A clerk who omits, as soon as practicable, to docket a judgment required to be docketed, or to furnish a transcript of a judgment, so docketed in his office, forfeits, to the person aggrieved, two hundred and fifty dollars, in addition to the damages sustained by reason of the omission.²⁷¹

§ 1999. Time for docketing.

A judgment cannot be docketed until the judgment roll is made up and filed.²⁷² Judgments shall only be entered, or docketed, in the offices of the clerks of the courts of this state, within the hours during which, by law, they are required to keep open their respective offices for the transaction of

²⁶⁵ Code Civ. Proc. § 3017. Like provisions apply to the judgments of the municipal court of Greater New York.

²⁶⁶ *In re Thompson*, 29 App. Div. 83, 51 N. Y. Supp. 384; *Humphrey v. Rising*, 51 N. Y. Supp. 584, 29 App. Div. 83.

²⁶⁷ *Daniels v. Southard*, 36 App. Div. 540, 55 N. Y. Supp. 692; *Rowe v. Peckham*, 39 App. Div. 173, 51 N. Y. Supp. 889.

²⁶⁸ *Townsend v. Tolhurst*, 57 Hun. 40, 10 N. Y. Supp. 378.

²⁶⁹ *Whitney v. Townsend*, 67 N. Y. 49.

²⁷⁰ *Blydenburgh v. Northrop*, 12 How. Pr. 289.

²⁷¹ Code Civ. Proc. § 1248. Common-law liability. *Blossom v. Barry*, 1 Lam. 190.

²⁷² *Blackfield v. Smith*, 27 Hun. 114.

business, and at no other time.²⁷³ Judgments docketed out of office hours do not become a lien until the next office hour after such docketing.²⁷⁴

§ 2000. Effect of docketing.

A judgment required to be docketed affects neither real property nor chattels real, nor is entitled to a preference, until the judgment roll is filed, and the judgment docketed.²⁷⁵ At common law, a judgment was not a lien on real property, and hence a judgment creditor acquires only such a lien as is given by statute.²⁷⁶ The judgment becomes a lien on the day it is docketed without recognizing fractions of a day.²⁷⁷ While a judgment becomes a lien on real property when it is docketed, it does not become a lien on personal property until an execution against property is delivered to the sheriff. In the present connection, the matter relating to executions will not be considered.

A judgment taken against persons jointly indebted, on a service of summons on only a part of them, does not, by being docketed, become a lien on any real property or chattel real, owned by a defendant not served.²⁷⁸

Real property which belonged to a decedent is not bound nor in any way affected by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued on such a judgment unless the judgment is expressly made, by its terms, a lien on specific real property therein described or expressly directs the sale thereof.²⁷⁹

A judgment for a sum of money, or directing the payment of money, where entered against a party after his death, as

²⁷³ Rule 8 of General Rules of Practice.

²⁷⁴ *France v. Hamilton*, 26 How. Pr. 180; *Hathaway v. Howell*, 54 N. Y. 97.

²⁷⁵ Code Civ. Proc. § 1250.

²⁷⁶ *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 114, 64 N. Y. Supp. 1044.

²⁷⁷ *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 61.

²⁷⁸ Code Civ. Proc. § 1936.

²⁷⁹ Code Civ. Proc. § 1823.

permitted by law, cannot become a lien on the real property, or chattels real, of the decedent, but it establishes a debt to be paid in the due course of administration.²⁸⁰

§ 2001. Nature and extent of lien.

A judgment is a lien on the real property and chattels real within the respective counties in which the judgment is docketed, which the judgment debtor has at the time of docketing or acquires within ten years.²⁸¹ The lien is purely statutory and the legislature may abolish it at any time before rights have become vested under it.²⁸² The lien is a mere general, and not a specific lien, upon the debtor's real estate,²⁸³ and is subject to every equity which exists against the real property of the judgment debtor when the judgment is docketed.²⁸⁴ The court will control the legal lien to protect prior equitable interests in such property, or the proceeds thereof.²⁸⁵ It has been held that the exemption of property from sale on execution does not exempt the property from being bound and charged by a judgment,²⁸⁶ but it has also been held that the lien does not attach to property purchased with pension money.²⁸⁷ The right of the owner in fee who, on granting land, excepts and reserves oil, gas, and other minerals, with the exclusive right to mine, etc., and the right of way for the purpose for a specified term of years, and the right to put up buildings for

²⁸⁰ Code Civ. Proc. § 1210; *Clark's Case*, 15 Abb. Pr. 227; *Nichols v. Chapman*, 9 Wend. 452.

²⁸¹ Code Civ. Proc. § 1251. By amendment in 1902, a judgment having the name or any part of the name of the judgment debtor designated as fictitious is not a lien until the true name is inserted, and by amendment in 1905 (Laws 1905 c. 432), the procedure in detail is provided for in such a case.

²⁸² *Watson v. New York Cent. R. Co.*, 47 N. Y. 157, 163.

²⁸³ Therefore the creditor cannot sue for waste committed thereon. *Lanning v. Carpenter*, 48 N. Y. 498.

²⁸⁴ *Matter of Howe*, 1 Paige, 125; *Brooks v. Wilson*, 53 Hun, 173, 6 N. Y. Supp. 116.

²⁸⁵ *Buchan v. Sumner*, 2 Barb. Ch. 165; *Wilkes v. Harper*, 2 Barb. Ch. 338.

²⁸⁶ *Smith v. Brackett*, 36 Barb. 571.

²⁸⁷ *Tyler v. Ballard*, 31 Misc. 540, 65 N. Y. Supp. 557.

Art. V. Docketing and Lien Created Thereby.—Nature, Extent of Lien.

the purpose, and take water during the term, is an interest in real estate, and is bound by the lien of a judgment.²⁸⁸

— **Property fraudulently conveyed.** Property fraudulently conveyed before the judgment is docketed is bound.²⁸⁹

— **Determinable fee.** Where the judgment debtor is vested with the fee of an estate in lands subject to be defeated by the exercise of a power of sale by executors, such estate is subject to the lien of the judgment, and upon a sale by the executors, the lien attaches to the proceeds.²⁹⁰

— **Life estates.** The judgment is a lien on a life estate of the judgment debtor,²⁹¹ but where, by a breach of a condition subsequent, a life tenancy is terminated, the judicial determination thereof discharges the lien of a judgment upon the life estate.²⁹²

— **Term for years.** It was formerly held that a term for years is not bound,²⁹³ but inasmuch as a term for years is a chattel real, such decisions are overruled by the Code provisions, except where it is expressly provided that a term for years is not real property.²⁹⁴

— **Land held under contract for purchase.** The interest of a person, holding a contract for the purchase of real property, is not bound by the docketing of a judgment, and cannot be levied upon or sold, by virtue of an execution issued

²⁸⁸ First Nat. Bank of Richburg v. Dow, 41 Hun, 13.

²⁸⁹ New York L. Ins. Co. v. Mayer, 19 Abb. N. C. 92; Brooks v. Wilson, 125 N. Y. 256. But see Matter of David, 44 Misc. 516, 90 N. Y. Supp. 85.

²⁹⁰ Sayles v. Best, 140 N. Y. 368.

²⁹¹ Verdin v. Slocum, 71 N. Y. 345.

²⁹² Moore v. Pitts, 53 N. Y. 85.

²⁹³ Vredenbergh v. Morris, 1 Johns. Cas. 223; Merry v. Hallet, 2 Cow. 497. A judgment is not a lien upon a lease having only two years to run, where the statute provides that there must be an unexpired term of at least five years to make the lease real property. Taylor v. Wynne, 30 State Rep. 352, 8 N. Y. Supp. 759.

²⁹⁴ See Code Civ. Proc. § 1430, which provides that the expression "real property" as used in articles three and four of the chapter on executions against property includes leasehold property where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease.

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upon a judgment.²⁹⁵ If the contract of sale has been fully performed and the vendee is in possession, a judgment against the vendor is not a lien on the land²⁹⁶ though a judgment against the vendee is.²⁹⁷

— **Property held merely as incident to passing title.** A judgment is not a lien against property conveyed to the judgment debtor, and immediately reconveyed by him to the grantor's wife pursuant to his agreement to do so, without consideration other than the object of transferring the husband's property to the wife.²⁹⁸

— **Equitable estates.** It seems that the lien attaches to the equitable estate or interest of a cestui que trust in a dry or passive trust but not in an active trust.²⁹⁹ But the judgment debtor has no interest, legal or equitable, in property paid for by him, but conveyed to another.³⁰⁰ So on a mere legal title, the lien does not, in equity, attach when the equitable title is in a third person.³⁰¹

§ 2002. Waiver of lien.

The fact that a judgment creditor has brought a suit in equity to set aside a fraudulent conveyance, and has had a receiver appointed therein of the personal property, and the rents and profits of the real estate, of the judgment debtor, does not amount to a waiver of the legal lien of the judgment on the real estate.³⁰² But where land was conveyed with

²⁹⁵ Code Civ. Proc. § 1253. A judgment is not a lien on a purchaser's interest in land where title has not passed, and where his right to a deed is not fully accrued. *Bates v. Ledgerwood Mfg. Co.*, 22 State Rep. 595, 4 N. Y. Supp. 524. The same rule prevailed under the Revised Statutes. *Grosvonor v. Allen*, 9 Paige, 74.

²⁹⁶ *Brown v. Crabh*, 156 N. Y. 417. See, also, *Johnson v. Strong*, 65 Hun. 479, 20 N. Y. Supp. 392.

²⁹⁷ *Jackson v. Walker*, 4 Wend. 462.

²⁹⁸ *O'Donnell v. Kerr*, 50 How. Pr. 334.

²⁹⁹ See *Brewster v. Power*, 10 Paige, 562; *Arnot v. Beadle*, Hill & D. Supp. 181, *Slemen v. Schurek*, 29 N. Y. 595.

³⁰⁰ *Underwood v. Sutcliffe*, 77 N. Y. 58.

³⁰¹ *Ells v. Tousley*, 1 Paige, 280.

³⁰² *Wilkinson v. Paddock*, 57 Hun. 191, 11 N. Y. Supp. 442; *New York L. Ins. Co. v. Mayer*, 19 Abb. N. C. 92; *Barnes v. Mott*, 64 N. Y. 397.

covenants against incumbrances but was subject to a judgment, and the judgment creditor, knowing the grantees' rights, released the sureties on appeal, from such judgment, the grantees were entitled to a discharge of their land from the lien of such judgment.

§ 2003. Power of court over docket.

A court of record has the same power and jurisdiction, concerning the docket of its judgments, kept by a county clerk, which it has concerning the docket kept by its own clerk. It may direct that such a docket be amended, or that its judgment there docketed, be docketed *nunc pro tunc*.³⁰³

§ 2004. Duration of lien.

Except as otherwise specially prescribed by law, a judgment docketed in a county clerk's office binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years, except that any judgment rendered having the name or any part of the name of the judgment debtor designated as fictitious shall not bind or be a charge on the real property or chattels real of any person. A judgment having the name or any part of the name of a judgment debtor designated as fictitious may be amended at any time within ten years after the docketing thereof, by inserting the true name of said judgment debtor, on such notice to him as the court shall direct; and such judgment shall thereafter be a lien on the real property and chattels real which the judgment debtor then has or may thereafter acquire but not for a longer period than ten years after the original docketing of such judgment.³⁰⁴ After ten years the lien is extinguished not only as to subsequent incumbrancers or purchasers but also as to the

³⁰³ Code Civ. Proc. § 1269.

³⁰⁴ Code Civ. Proc. § 1251.

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judgment debtor himself.³⁰⁵ The limitation of ten years was restricted, under the Revised Statutes, to purchasers and incumbrancers. To save the lien as against bona fide purchasers and incumbrancers, not only must execution issue, but the sale must take place within ten years unless restrained by injunction or writ of error.³⁰⁶ The question of notice of the existence of a judgment, actual or constructive, is of no importance in so far as subsequent incumbrancers or purchasers are concerned.³⁰⁷ The duration of the lien is limited by the statutory provision in force at the time it was rendered, and is not affected by a subsequent enactment.³⁰⁸

—**Rights after expiration of ten years.** After the ten years from the date of the filing of the judgment roll have expired, the property is released from all lien of the judgment and it cannot even be levied on by an execution, except where the judgment debtor has died, except on filing the notice specified in section 1252 of the Code which reads as follows:³⁰⁹ "When ten years after filing the judgment roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as the heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee, specifying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as a notice of the pendency of an action. For that purpose, the judgment debtor, or his heir or devisee, named in the notice, is regarded as a

³⁰⁵ *Matter of Harmon*, 79 Hun, 226, 29 N. Y. Supp. 555; *Floyd v. Clark*, 16 Daly, 528, 17 N. Y. Supp. 848.

³⁰⁶ *Darling v. Littlejohn*, 35 State Rep. 516, 12 N. Y. Supp. 205.

³⁰⁷ *Little v. Harvey*, 9 Wend. 157; *Tufts' Adm'r v. Tufts*, 18 Wend. 621.

³⁰⁸ *Matter of Harmon*, 79 Hun, 226, 29 N. Y. Supp. 555.

³⁰⁹ *Nutt v. Cuming*, 22 App. Div. 92.

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party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned.³¹⁰ This Code section was passed to enable a creditor after the lapse of the ten years to bind and reach the real property of the judgment debtor or of an heir or devisee by issuing an execution and filing a notice similar to a notice of the pendency of the action.³¹¹ The execution authorized by this section during the life of the judgment and after its lien period has expired is a new special mode of levying an execution on land, designed to revive and continue the twenty year lien right conferred by the Revised Statutes, but in a different manner.³¹² The lien created commences from the time the notice is indexed and recorded and the execution must require a sale of the right and title of the debtor existing at that time, and not at the time of the original docketing of the judgment.³¹³

The section of the Code (1380) extending the lien to more than ten years where the judgment debtor dies within said ten years will be considered in connection with the chapter on executions.

— **Suspension of running of time.** The time, during which a judgment creditor is stayed, by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing a judgment, is not a part of the ten years, to which the lien of a judgment is limited. But this does not extend the time of the lien, as against a purchaser, creditor, or mortgagee in good faith.³¹⁴ Thus, an order opening a defendant's default, but permitting the judgment to stand as security, does not, as against purchasers, creditors, and mortgagees in good faith, extend the lien beyond the ten years.³¹⁵

³¹⁰ Code Civ. Proc. § 1252.

³¹¹ *Atlas Refining Co. v. Smith*, 52 App. Div. 109.

³¹² *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 114, which thoroughly reviews the statutes.

³¹³ *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 115.

³¹⁴ Code Civ. Proc. § 1255. Meaning of "good faith," see *Bronner v. Loomis*, 17 Hun, 439.

³¹⁵ *Hansee v. Fiero*, 56 Hun, 463.

§ 2005. Suspending lien on appeal.

Where an appeal from a judgment has been perfected, and an undertaking has been given, sufficient to entitle the appellant to a stay of the execution of the judgment, without an order for that purpose, the court, in which the judgment was recovered, may, in its discretion and upon such terms as justice requires, make an order, upon notice to the attorney for the respondent, and to the sureties in the undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real, upon which the judgment is a lien, or a portion thereof, specifically described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket book, substantially as follows: "Lien suspended upon appeal. See order entered," adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry substantially as follows: "Lien partially suspended upon appeal. See order entered;" adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket book, as required by the order.⁹¹⁶ The operation of this Code section is confined to the proceedings to be taken to procure the order, and the entries thereupon, in the office of the clerk of the court wherein the judgment was rendered. It applies only to such judgments as are a lien on real estate.⁹¹⁷ It will be observed that notice of the application must be given not only to the attorney for the respondent but also to the sureties on appeal, but failure to give notice to the sureties does not discharge them,⁹¹⁸ though they may have the order vacated because of such omission.⁹¹⁹ The entry on the docket of a judgment,

⁹¹⁶ Code Civ. Proc. § 1256. For form of affidavit, see 2 Abbott, New Pr. & F. 1307.

⁹¹⁷ *Heimov v. Bush*, 35 Hun. 637.

⁹¹⁸ *Burrall v. Vanderbilt*, 6 Abb. Pr. 70.

⁹¹⁹ *Green v. Millank*, 3 Abb. N. C. 135.

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"Lien suspended on appeal," releases the lien of the judgment in regard to all property upon which the judgment would otherwise become a lien; and it is not necessary that the order directing such entry shall specifically state that the lien is suspended as to subsequently acquired property.³²⁰ One who takes a mortgage in good faith on the judgment debtor's land while the judgment is so marked and the appeal pending, takes it free from the lien of it, and it is not requisite for him to have parted with value at the time, provided he took the mortgage fairly and honestly and for full value.³²¹ The fact that a judgment docketed during the suspension of a former lien has been purchased for less than its face value, does not establish that the purchaser acquired it in bad faith.³²²

Where the order is made by the supreme court or by a county court, it operates as a suspension of the lien upon property situated in the county where the judgment roll is filed, from the time when the order is entered, and the proper entry made in the docket book. If the property exempted is situated in another county, or if the order was made by a court, other than the supreme court or a county court, the order operates as a suspension from the time when the proper entry is made in the docket book, kept by the clerk of that county, as prescribed in the next section.³²³

The clerk with whom the order is entered must, upon payment of his fees therefor, furnish to the party who obtained the order, one or more transcripts, attested by his signature, of the docket of the judgment, including the entry made upon the docket. A county clerk in whose office the judgment is docketed must, upon payment of his fees therefor, immediately file such a transcript, and make an entry upon the docket of the judgment, in each place where it appears in his docket book, substantially as follows: "Lien suspended," or "Lien partially suspended," according to the entry upon the original

³²⁰ *Wronkow v. Oakley*, 133 N. Y. 505.

³²¹ *Union Dime Sav. Inst. v. Duryea*, 67 N. Y. 84; *Bronner v. Loomis*, 17 Hun, 439.

³²² *Harmon v. Hope*, 87 N. Y. 10.

³²³ Code Civ. Proc. § 1257.

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docket, and also, "See transcript filed;" adding the proper date.³²⁴

— Form of order releasing property from lien.

[Title of action.]

At a special term, etc.

On reading and filing the affidavit of ———, verified the ——— day of ———, 190—, and on motion of ———, attorney for ———:

It is ordered that all the real property and chattels real on which the judgment entered in this action in the office of the clerk of the ——— court on the ——— day of ———, 190—, in favor of ———, the ———, and against ———, the ———, for the sum of ——— dollars, is a lien, be and the said real property and chattels real are exempted from the lien of the aforesaid judgment as against judgment creditors and purchasers and mortgagees in good faith.

It is further ordered that the said clerk make an entry on the docket of the aforesaid judgment in each place where it appears in the docket book in his office substantially as follows: "Lien suspended upon appeal; see order entered ———, 190— [date of order]."

— Restoring lien. At any time after a judgment, which has ceased to be a lien, as prescribed in sections 1256 to 1258 of the Code, is affirmed, or the appeal therefrom is dismissed, the lien thereof may be restored, as follows:

1. The clerk, in whose office the judgment of affirmance, or the order dismissing the appeal, is entered, must, upon the request of the judgment creditor, docket the judgment anew, as it was originally docketed, but in the order of priority of the new docket; and he must write upon the new docket, the words, "Lien restored by redocket;" adding the date of redocketing.

2. A transcript of the new docket must be furnished to a county clerk, in whose office an entry of the suspension of the lien has been made, as prescribed in sections 1257 and 1258; and thereupon the judgment must be docketed by him anew in the order of the priority of the new docket. The clerk who so redockets the judgment must make an entry upon the new docket, substantially as follows: "Lien restored by redocket. See transcript filed;" adding the date of redocketing in his county.

³²⁴ Code Civ. Proc. § 1258.

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The lien of the judgment is thereupon restored, for the unexpired period thereof, as if the order had not been made; but with like effect only, as against judgment creditors, purchasers, and mortgagees in good faith, as if the judgment had then been first docketed.³²⁵ Where an order suspending the lien of the judgment creditor during appeal has been vacated and the lien has been restored, such restoration does not operate retrospectively or restore the original lien against a creditor whose judgment has been docketed in the interval.³²⁶

§ 2006. Canceling docket of reversed or modified judgment.

Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or has been affirmed as to part only of the sum, upon an appeal to the supreme court from an inferior court or to the appellate division from a judgment of the supreme court, and an appeal to the court of appeals is not taken and perfected, and the security required to stay execution is not given, within ten days after the entry of the judgment upon the appeal, in the clerk's office where the judgment appealed from is entered, the clerk must make a minute of the reversal of the judgment, or of the amount to which it has been reduced, upon his docket book, in each place where the judgment is docketed. A transcript of the docket, as thus corrected, must be furnished by him, and may be filed in any county clerk's office where the original judgment is docketed, as prescribed by law, with respect to the original docket, and thereupon the county clerk must correct his docket accordingly. The lien of a judgment, the docket of which is not corrected, as prescribed in this section, remains unaffected by the reversal or modification thereof, until the decision of the court of appeals, upon an appeal from the judgment reversing or modifying the same, or the expiration of the time to take such an appeal.³²⁷ In short, the reversal or modification of a judgment discharges

³²⁵ Code Civ. Proc. § 1259.

³²⁶ *Harmon v. Hope*, 87 N. Y. 10.

³²⁷ Code Civ. Proc. § 1321. Docket may be corrected, in like manner, after appeal to court of appeals, and filing of its remittitur. *Id.*, § 1322.

or diminishes its lien only where the reversal is noted on the docket.³²⁸ But after being noted on the docket, a subsequent sale under the judgment is invalid.³²⁹

§ 2007. Priorities.

Where real property is sold and conveyed, and, at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or a part of the purchase money, the lien of the mortgage upon that real property is superior to the lien of a previous judgment against the purchaser.³³⁰ It would seem that this Code provision also applies to a purchase-money mortgage given to a third person who advanced the purchase money.³³¹

Generally, a vendor's lien for unpaid purchase money is superior to the lien of a judgment against the vendee.³³² It is a rule, however, that the judgment of a creditor who advances his money upon the faith of an unincumbered title upon the record without notice, is entitled to preference over a secret unrecorded lien of a vendor for part of the purchase money;³³³ but this does not apply where the creditor is merely an ordinary creditor who contracts a debt with another supposing that he is the owner of property unincumbered and has ability to pay.³³⁴

Judgment creditors acquire liens upon real estate in the order in which their judgments are docketed, without regard to the order in which suits are brought to set aside a prior fraudulent conveyance of the real estate.³³⁵ Two judgments, docketed against a defendant at different times, will both at-

³²⁸ *East v. Dilaye*, 65 Barb. 221, which also held that a conveyance after reversal noted on docket was good notwithstanding order of reversal was afterwards reversed.

³²⁹ *Wainwright v. Gaber*, 8 N. Y. 138.

³³⁰ Code Civ. Proc. § 1254. See, also, *Spring v. Short*, 90 N. Y. 528.

³³¹ So held under the Revised Statutes. *Jackson v. Austin*, 15 Johns. 477; *Haywood v. Noddy*, 3 Barb. 643.

³³² *Arnold v. Patrick*, 6 Paige 316.

³³³ *Hunt v. Whipple*, 28 Barb. 224.

³³⁴ *Spring v. Short*, 90 N. Y. 528.

³³⁵ *Wilkinson v. Paddock*, 27 Hun 191.

tach to subsequently acquired real property at the same moment, and neither will have priority over the other on account of the priority of docket.³³⁶ It seems that an order permitting an amendment of a judgment upon condition that the amended judgment be postponed to another judgment subsequently recovered, will not postpone the judgment where the latter judgment, although docketed in form, is, as matter of law, void.³³⁷

ART. VI. AMENDMENTS.

§ 2008. General considerations.

In a preceding volume, the Code provision as to amendments has been considered in its general application,³³⁸ and the rules there stated will not be reiterated. It will be necessary, however, to briefly consider the application of such Code rules to judgments. Both by Code provisions,³³⁹ and independent of statute,³⁴⁰ the court may, in furtherance of justice, amend the judgment by correcting a mistake or supplying an omission, provided the substantial rights of the parties are unaffected by the amendment,³⁴¹ i. e., the amendment must not relate to the merits.³⁴² In other words, a judgment cannot be amended so as to vary the rights of the parties as fixed by the

³³⁶ *Goetz v. Mott*, 21 Abb. N. C. 246, 1 N. Y. Supp. 153, 15 Civ. Proc. R. (Browne) 11; *Matter of Hazard*, 73 Hun, 22, 56 State Rep. 82, 25 N. Y. Supp. 928.

³³⁷ *Symson v. Selheimer*, 105 N. Y. 660.

³³⁸ Volume 1, p. 704.

³³⁹ Code Civ. Proc. §§ 723, 724.

³⁴⁰ *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901; *Dietz v. Farish*, 43 Super. Ct. (11 J. & S.) 87.

³⁴¹ *Heath v. New York Bldg. Loan Banking Co.*, 146 N. Y. 260; *Meyer v. Haven*, 70 App. Div. 529, 75 N. Y. Supp. 261; *Meldon v. Devlin*, 39 App. Div. 531, 57 N. Y. Supp. 670. It seems that a trial court after an award of final judgment has no power to amend the judgment in a matter of substance for error committed on the trial or in decision, or by amendment to limit the legal effect of the judgment to meet some supposed equity subsequently called to its attention. *Stannard v. Hubbell*, 123 N. Y. 520.

³⁴² *Heath v. New York Bldg. Loan Banking Co.*, 146 N. Y. 260; *Spofford v. Pearsall*, 28 Misc. 730, 60 N. Y. Supp. 218.

verdict of the jury, the decision of the court, or the report of a referee, and the judgment entered thereon.³⁴³

§ 2009. Grounds.

The Code provides, in effect, that if the judgment fails to conform to the Code provisions, the court may permit an amendment thereof, to conform it to the provision.³⁴⁴ Mere clerical mistakes³⁴⁵ or omissions³⁴⁶ are amendable. When the objection to the judgment is that it is irregular in form, the plaintiff's remedy is by motion at special term, and not by appeal.³⁴⁷ Thus, the objection, in an action for a wrongful levy, that the form of the judgment is not according to the statute, but that it erroneously directs payment of the money in addition to awarding a return of the property, is a question of practice, to be raised by motion below, at special term.³⁴⁸ So a motion to strike out is the proper remedy to correct a judgment which contains an unauthorized provision.³⁴⁹

— **Failure of judgment to conform to verdict, report, or decision.** If the judgment does not conform to the judge's

³⁴³ *Smith v. Smith*, 40 App. Div. 251, 57 N. Y. Supp. 1122.

³⁴⁴ Code Civ. Proc. § 724. This section applied in *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901, where excessive extra allowance in the judgment was reduced.

³⁴⁵ *Morrison v. Metropolitan El. R. Co.*, 60 App. Div. 180, 70 N. Y. Supp. 65. The exercise of the power of the court to amend its judgment rolls or records should be limited to the correction of mistakes or omissions. *Jones v. Newton*, 47 State Rep. 217, 19 N. Y. Supp. 786. A judgment will be amended whether the mistake has happened through the omission of an attorney or by that of the clerk, since both are equally officers of the court. *Close v. Gillespey*, 3 Johns. 526; *Neele v. Berryhill*, 4 How. Pr. 16.

³⁴⁶ *D'Andre v. Zimmermann*, 17 Misc. 357, 39 N. Y. Supp. 1086; *Beltz v. Fuller*, 92 Hun. 457, 36 N. Y. Supp. 950.

³⁴⁷ *Sluyter v. Williams*, 37 How. Pr. 109; *Beers v. Shannon*, 73 N. Y. 292.

³⁴⁸ *Buck v. Remsen*, 34 N. Y. 383.

³⁴⁹ *Sabater v. Sabater*, 7 App. Div. 70, 39 N. Y. Supp. 958. If the court improperly inserts a provision in the judgment, after a reference to hear and determine, the proper practice is to move to strike out the provision as irregular. *Shrady v. Van Kirk*, 77 App. Div. 261, 266, 79 N. Y. Supp. 79.

ART. VI. Amendments — Grounds

decision, where the trial was without a jury, it may be amended.³⁵⁰ So where a judgment does not conform to the verdict, the proper remedy is by motion to correct and not by appeal.³⁵¹ And the same rule applies to the report of a referee.³⁵² Furthermore the trial court has power to correct such error in the form of a judgment even if it has been affirmed by the appellate court.³⁵³

— **Judicial errors.** Judicial errors are to be corrected by a motion to vacate the judgment or by an appeal.³⁵⁴ But a judge who has inadvertently made erroneous findings of law may, before the time to appeal has expired, correct the judgment by ordering, on notice, a resettlement of the findings.³⁵⁵ Where, however, the judge who heard the cause assumes to adjudicate the costs as if the action were an equitable one, the error being one of judgment and not of inadvertence, is to be corrected on appeal, and not on motion for amendment.³⁵⁶ And, after entry of judgment in an equitable action the special term has no power, upon motion of one of the parties, to amend the findings, conclusions, and judgment so as to provide for a smaller recovery where it substantially changes the rights of the parties.³⁵⁷

— **Void judgments.** Jurisdictional defects are not amendable. Thus, a judgment entered without service of process is not amendable where the defendant has not appeared.³⁵⁸ So

³⁵⁰ *Petrie v. Trustees of Hamilton College*, 92 Hun, 81, 36 N. Y. Supp. 636.

³⁵¹ *Goodwin v. Schreiber*, 86 Hun, 339, 33 N. Y. Supp. 456.

³⁵² *Howland v. Howland*, 20 Hun, 472.

³⁵³ *Corn Exch. Bank v. Blye*, 119 N. Y. 414.

³⁵⁴ *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190; *Strauss v. Bendheim*, 32 Misc. 179, 66 N. Y. Supp. 247.

³⁵⁵ *Coffin v. Lesster*, 36 Hun, 347. Distinguishing *Rockwell v. Carpenter*, 25 Hun, 529, as a case where there was a change of facts and in a mode not authorized by law; and further distinguishing *McLean v. Stewart*, 14 Hun, 472, as a case of a correction not sustained by evidence.

³⁵⁶ *Norton v. Fancher*, 92 Hun, 463, 36 N. Y. Supp. 1032.

³⁵⁷ *Heath v. New York Bldg. Loan Banking Co.*, 146 N. Y. 260.

³⁵⁸ *Bellamy v. Guhl*, 62 How. Pr. 460; *Schoellkopf v. Ohmeis*, 11 Misc. 253, 32 N. Y. Supp. 736.

if a judgment is entirely unauthorized, as where no decision has been entered after a trial by the court without a jury, the judgment is not amendable.³⁵⁰

§ 2010. Reducing amount of recovery.

The court may allow an amendment reducing the amount of recovery,³⁵¹ even though such amendment is to bring the action within the jurisdiction of the court.³⁶¹

§ 2011. Applications at foot of decree.

In final judgments it is often necessary to insert directions commanding the parties to do particular things, for the purpose of carrying the judgment into effect, which do not relate to the merits of the controversy, and as to such matters the judgment may be modified on motion.³⁶² The right to apply at the foot of the decree ordinarily appertains only to the carrying out of the determination which the court, by the decree, has made, and does not relate to the trial and investigation of new issues not embraced within the original action. Whatever directions it might be necessary for the court to give, to carry out its decree, form the fitting subject of an application at the foot of a decree.³⁶³ Thus, where a judgment permits plaintiff to make a certain tender within a specified time, or, upon his default in that respect his injunction shall become inoperative, the court may, after the expiration of

³⁵⁰ *Electric Boat Co. v. Howey*, 96 App. Div. 410, 89 N. Y. Supp. 210.

³⁵¹ *Homans v. Tyng*, 56 App. Div. 383, 67 N. Y. Supp. 792.

³⁵² *Stinerville & B. Stone Co. v. White*, 25 Misc. 314, 54 N. Y. Supp. 577.

³⁵³ The court has power to make an order extending the time within which, by the terms of a judgment for specific performance, the defendant was required to pay the purchase money and accept title to lands. *Adams v. Ash*, 46 Hun. 195, 11 State Rep. 618.

³⁵⁴ *Parker v. Linden*, 59 Hun. 359, 13 N. Y. Supp. 95. In the absence of a party necessarily affected by the determination, and of proof of the facts upon which the rights of the parties appearing depend, although such rights are admitted by her, the court is without jurisdiction to determine such new issues. *Dudlow v. Benner*, 2 Silv. Sup. Ct. 31, 25 State Rep. 418, 6 N. Y. Supp. 293.

the time so limited, make an order extending the time for making the tender.³⁶⁴ So the court has power after final judgment to so amend it as to permit defendant to pay into court the sum thereby directed to be paid plaintiff, where defendant has been unable, after diligent search, to find the plaintiff for the purpose of making a tender.³⁶⁵ So where a judgment in a creditor's suit declares a transfer by the debtor to be void, and directs the parties to account, it is proper after such accounting has been had, to enter a supplemental judgment upon the foot of the first judgment, directing the defendants to turn over the property mentioned, or its value.³⁶⁶ But a substantial alteration relative to a subject-matter which, if the rights of the parties demanded, should have been investigated at the trial, cannot be so made.³⁶⁷ And where a judgment in equity is valueless, the court cannot, by a supplemental interlocutory judgment, provide for the payment of damages as a substitute.³⁶⁸

§ 2012. Discretion of court.

Whether an amendment shall be allowed rests largely in the discretion of the lower court.³⁶⁹

§ 2013. Motion.

The motion to amend should be made before the judge who tried the case, unless he is no longer on the bench.³⁷⁰ The motion should be based on notice to the opposing party;³⁷¹

³⁶⁴ Conklin v. New York El. R. Co., 18 Civ. Proc. R. (Browne) 366, 13 N. Y. Supp. 782.

³⁶⁵ Rauth v. New York El. R. Co., 23 Civ. Proc. R. (Browne) 95, 23 N. Y. Supp. 750.

³⁶⁶ James Goold Co. v. Maheady, 38 Hun, 294.

³⁶⁷ Parker v. Linden, 59 Hun, 359, 13 N. Y. Supp. 95.

³⁶⁸ Koehler & Co. v. Brady, 87 App. Div. 326, 84 N. Y. Supp. 457.

³⁶⁹ Smith v. Smith, 40 App. Div. 251, 57 N. Y. Supp. 1122.

³⁷⁰ Oakley v. Cokalet, 6 App. Div. 229, 39 N. Y. Supp. 1001; Wells v. Vanderwerker, 45 App. Div. 155, 60 N. Y. Supp. 1089.

³⁷¹ Allen v. Swan, 32 Hun, 363; Brown v. Hardie, 28 Super. Ct. (5 Rob.) 678. A judgment should not be amended nunc pro tunc by changing the name of the debtor without notice to him. Nagle v.

but although it is irregular for the court to grant an order enlarging the time for performance of the judgment, on an ex parte application, the adverse party has no right to disregard the order for that reason.³⁷² The motion to correct a judgment for irregularity must specify the particulars, and it is not enough that the affidavit gives the opinion of counsel or makes a general allegation.³⁷³ An amendment may be allowed to defeat a motion to vacate, even though there is no cross motion.³⁷⁴

— **Time.** The motion to amend should be made promptly as it may be denied for laches;³⁷⁵ and if the motion is based on section 724 of the Code, it must be within a year from the time of entry of the judgment.³⁷⁶

§ 2014. Order.

Inasmuch as the allowance of an amendment is a matter of discretion, terms may be imposed. Thus, where the laches of the party asking amendment of a judgment roll, in not moving before trial, had made the trial of the action abortive, the costs of the trial should be imposed as a condition of granting the amendment.³⁷⁷ But the court, on granting an application

Junker, 17 Wkly Dig. 428. But it seems that the amendment of a judgment in foreclosure after its entry but before the sale, by directing that the sale be made subject to the life estate of one of the parties to the action, is competent, without notice to the defendants who did not appear nor answer. *Brown v. Beckmann*, 53 App. Div. 257, 65 N. Y. Supp. 749.

³⁷² *Adams v. Ash*, 46 Hun, 195.

³⁷³ *Oliver v. French*, 82 Hun, 426, 31 N. Y. Supp. 740. Followed in *Union Bag & Paper Co. v. Allen Bros. Co.*, 94 App. Div. 595, 88 N. Y. Supp. 268.

³⁷⁴ *Wight v. Allen*, 3 How. Pr. 213.

³⁷⁵ *Haines v. Patterson*, 87 Hun, 109, 33 N. Y. Supp. 814; *Gall v. Gall*, 58 App. Div. 97, 68 N. Y. Supp. 649; *Arents v. Long Island R. Co.*, 36 App. Div. 379, 55 N. Y. Supp. 461.

³⁷⁶ *Duryea v. Fuechsel*, 145 N. Y. 654; *Martin v. Lott*, 4 Abb. Pr. 365. But if motion made within a year is denied with leave to renew, renewed motion need not be made within the year. *French v. Oliver*, 9 App. Div. 624, 41 N. Y. Supp. 106.

³⁷⁷ *Jones v. Newton*, 47 State Rep. 217, 19 N. Y. Supp. 786.

ART. VI. Amendments.

of a plaintiff to amend his judgment, should not couple with the leave a provision absolutely postponing the lien of such judgment to another judgment thereafter recovered, but the order should grant the leave upon condition that plaintiff assent to the postponement of his lien, thus giving the option to him of taking his favor upon the condition imposed, or of not taking it and leaving his judgment in its original state.³⁷⁸

§ 2015. Amendment nunc pro tunc.

An amendment nunc pro tunc is proper where no new rights have intervened.³⁷⁹

§ 2016. Mode of amending.

Amending a judgment record by obliteration or erasure, even when it leaves the passage legible, is improper. It should be by appending the order of amendment to the roll, and by entering it in the proper book, and referring in the margin of the entry of judgment to an amendment as made by an order of such a date. The portions changed or omitted could be designated by brackets, underscoring, or otherwise. Or, the judgment may be entered anew as amended.³⁸⁰ On amending the docket of a judgment, in the amount, a copy of the order should be filed in each of the clerks' offices and a brief reference made to it in the several dockets.³⁸¹

§ 2017. Mandamus to compel amendment.

The amendment of a judgment cannot be compelled by mandamus.³⁸²

³⁷⁸ Symson v. Selheimer, 105 N. Y. 660.

³⁷⁹ Toronto General Trust Co. v. Chicago, B. & Q. R. Co., 123 N. Y. 37.

³⁸⁰ Slayter v. Smith, 15 Super. Ct. (2 Bosw.) 673; Mead v. Dorland, 1 Month. Law Bul. 14. But amending by erasure is not ground for vacating the judgment. Slayter v. Smith, supra.

³⁸¹ Hunt v. Grant, 19 Wend. 90.

³⁸² Matter of Kling, 60 App. Div. 512, 69 N. Y. Supp. 962.

ART. VII. VACATING OR SETTING ASIDE.

§ 2018. Scope of article.

This article refers merely to motions, and not to actions, to set aside a judgment. It is intended to cover the same matter set forth in sections 1282 to 1292 of the Code and also section 724 of the Code.

§ 2019. General considerations.

An attorney has no authority to consent to vacate a judgment.³²⁸ A motion to set aside a judgment is a proceeding in the action.³²⁹ A judgment entered on a demurrer may be vacated.³³⁰ A judgment in rem, at least before it is finally executed, is never so conclusive upon the court which rendered it as to prevent it from vacating or setting it aside for sufficient reason.³³¹ The county court has power, on motion, to cancel for illegality a justice's judgment docketed in the county court.³³²

§ 2020. Grounds.

The power of a court of record to vacate its judgment in furtherance of justice does not depend on the Code.³³³ The Code does not set forth the grounds for vacating a judgment but it differentiates the procedure according to whether the motion is based on an "irregularity" or an "error in fact." An irregularity has been defined in a preceding volume where the general nature thereof has been considered.³³⁴ It will be impossible, in this connection, to mention every irregularity which has been held ground for vacating a judgment. An

³²⁸ *Quinn v. Lloyd*, 5 Abb. Pr. (N. S.) 281, 26 How. Pr. 378.

³²⁹ *Pitkin v. Cuddey*, 5 Hun, 48.

³³⁰ *Vanderbilt v. Schreyer*, 81 N. Y. 646.

³³¹ *Matter of Rochester*, 126 N. Y. 83.

³³² *Daniels v. Southard*, 23 Misc. 225, 51 N. Y. Supp. 1126.

³³³ *Bonnelly v. McArdle*, 14 App. Div. 217, 43 N. Y. Supp. 566; *Croner v. Farmers' P. Ins. Co.*, 18 App. Div. 263, 46 N. Y. Supp. 198; *Ladd v. Willett*, 22 Wkly. Dig. 521.

³³⁴ See vol. 1, p. 700.

Art. VII. Vacating or Setting Aside. Grounds

"error in fact" includes errors not appearing on the record nor in the evidence, such as the infancy of a defendant.³⁹⁰ Fraud practiced by a party is neither an irregularity nor an error in fact.³⁹¹ An irregularity which is not prejudicial to the adverse party is not ground for setting aside the judgment.³⁹² But a judgment clearly irregular must be set aside, without considering whether defendant has merits or only seeks delay.³⁹³ The judgment may be set aside because of defects in the summons,³⁹⁴ or because the referee was appointed without an order of the court,³⁹⁵ or because the decision on which the judgment is entered is insufficient in that it does not direct any judgment.³⁹⁶ So a judgment entered in violation of a stipulation will be set aside.³⁹⁷ Error in the amount of a judgment is generally not ground for vacating on motion but the mistake may ordinarily be corrected by amendment.³⁹⁸

³⁹⁰ *Peck v. Coler*, 20 Hun, 534.

³⁹¹ *Furman v. Furman*, 153 N. Y. 309.

³⁹² *Hees v. Nellis*, 1 T. & C. 118, 65 Barb. 440. Judgment not to be set aside for any default of a clerk in entering orders, by which neither party was prejudiced. *Bascom v. Feazler*, 2 How. Pr. 16. Failure to folio a judgment affords no ground for vacating it, the adverse party not being prejudiced. *New York City Baptist Mission Soc. v. Tabernacle Baptist Church*, 10 App. Div. 288, 75 State Rep. 1352, 41 N. Y. Supp. 976. A judgment will not be vacated because of the erroneous addition of papers to the judgment roll, where no harm was thereby done to the objecting party. *Chester v. Jamel*, 24 State Rep. 229, 2 Silv. Sup. Ct. 179, 5 N. Y. Supp. 823.

³⁹³ *Hughes v. Wood*, 12 Super. Ct. (5 Duer) 603, note.

³⁹⁴ *James v. Kirkpatrick*, 5 How. Pr. 241. But judgment will not be set aside because the summons served omitted the name of plaintiff's attorney. *Hull v. Canandaigua Elec. Light & R. Co.*, 55 App. Div. 419, 66 N. Y. Supp. 865.

³⁹⁵ *Merrill v. Green*, 55 N. Y. 270.

³⁹⁶ *Reynolds v. Aetna L. Ins. Co.*, 6 App. Div. 254, 39 N. Y. Supp. 885.

³⁹⁷ *Jay v. De Groot*, 28 How. Pr. 107.

³⁹⁸ *Matter of Sutcliffe*, 83 Hun, 324, 31 N. Y. Supp. 929. Where a party has a judgment for more than is due him and more than he has a right to collect, the remedy of the judgment debtor is to tender or pay the sum due, and then if the creditor refuses to cancel the judgment, to apply to the court by motion to compel cancellation or to stay execution. A suit in equity is unnecessary and improper. *Roach v. Duckworth*, 95 N. Y. 391.

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A judgment which has been entered by plaintiff's attorney after a settlement made by the parties, though in ignorance thereof, will be set aside, in the absence of proof that such settlement was collusive or the plaintiff irresponsible.³⁹⁰ Where new matter has arisen since entry of judgment, of such a nature that it is clear that the judgment ought not to be executed, the court will relieve against it on motion, upon undisputed facts.³⁹¹ A judgment entered on the report of a referee, where plaintiff had died before such report, will be set aside where defendant was ignorant of the fact.³⁹²

A judgment may be vacated to allow an amendment of the complaint,³⁹³ but not to enable plaintiff to set up a different cause of action.³⁹⁴ Nor should a judgment be opened, to the prejudice of plaintiff, merely to enable defendant to interpose a counterclaim, which he may enforce by action, where there is no doubt of plaintiff's responsibility.³⁹⁵

Want of jurisdiction. Lack of jurisdiction is always ground for setting aside the judgment.³⁹⁶ In other words, a party is entitled to have a void judgment vacated, though it would be subject to collateral attack.³⁹⁷

It is ground for setting aside a judgment that no summons was served, where no appearance was entered.³⁹⁸ So it is

³⁹⁰ *Publishers' Printing Co. v. Gillen Printing Co.*, 16 Misc. 558, 38 N. Y. Supp. 784.

³⁹¹ *Welmere v. Law*, 34 Barb. 515, 22 How. Pr. 130; *People v. New York City*, 11 Abb. Pr. 66. See also, *Lewy v. Fox*, 54 Super. Ct. (22 J. & S.) 397.

³⁹² *Arents v. Long Island R. Co.*, 36 App. Div. 379, 55 N. Y. Supp. 401.

³⁹³ *Jaggard v. Cunningham*, 8 Daly, 511.

³⁹⁴ *Electric Boat Co. v. Hawey*, 88 App. Div. 522, 85 N. Y. Supp. 95.

³⁹⁵ *Lahey v. Kingon*, 13 Abb. Pr. 192; *Leahy v. Kingon*, 22 How. Pr. 209.

³⁹⁶ *Lambert v. Converse*, 22 How. Pr. 265. A judgment which is an apparent lien, though really void because defendant was dead when the action was commenced may be set aside by the court on motion of defendant's heir after plaintiff's death and without requiring execution to be satisfied for plaintiff. *Blodget v. Blodget*, 42 How. Pr. 19.

³⁹⁷ *Anderson v. Carr*, 26 State Rep. 642, 7 N. Y. Supp. 281.

³⁹⁸ The court has power to set aside an unauthorized judgment when
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ground that the service was insufficient,⁴⁰⁸ or that judgment was entered in favor of a defendant not served.⁴⁰⁹

—**Fraud.** A judgment may be set aside, on motion, for fraud practiced by a party.⁴¹⁰ And the fact that one of the parties to the action loses, by the vacation of a judgment on the ground of fraud, an adjudication as to her status in respect to her property involved will not prevent the court setting the judgment aside, although such party did not participate in the fraud.⁴¹¹

—**Want of cause of action.** The court has power to set aside a judgment upon motion where it clearly appears that plaintiff had no legal cause of action.⁴¹²

the party affected thereby has not been heard or brought before the court for the purpose of considering the question involved in the judgment. *Rogers v. Ivers*, 23 Hun, 424. In an action for infringement of a trade-mark, judgment cannot be entered against two defendants, only one of whom was served with summons, and as to the one not served the judgment should be vacated on his motion. *Siebert v. Abbott*, 62 Hun, 475, 42 State Rep. 788, 16 N. Y. Supp. 914. The proper proceeding where a judgment has been obtained upon a false affidavit of service, is by motion to set it aside. *Fullan v. Hooper*, 19 Wkly. Dig. 93. But a motion by a wife to set aside a judgment of foreclosure on the ground that the summons had not been personally served upon her as stated in the judgment roll was properly denied in the discretion of the court, her interest being merely inchoate. *Smith v. Askin*, 20 Wkly. Dig. 394.

⁴⁰⁸ See *Van Benthuyzen v. Lyle*, 8 How. Pr. 312.

⁴⁰⁹ If a judgment dismissing the complaint is irregular for the reason that it should not have been entered in favor of defendants, who were not served and had not appeared in the action, the remedy of the plaintiff is by motion and not by appeal. *Seagrist v. Sigrist*, 20 App. Div. 336, 46 N. Y. Supp. 949.

⁴¹⁰ *Furman v. Furman*, 153 N. Y. 309; *Nugent v. Metropolitan St. R. Co.*, 46 App. Div. 105, 61 N. Y. Supp. 476. See, also, *Ingalls v. Merchants' Nat. Bank*, 51 App. Div. 305, 64 N. Y. Supp. 911. But in order to warrant setting aside a judgment for fraud, a strong case should be established, free from any reasonable doubt. Otherwise he should be left to action. *Hill v. Northrop*, 9 How. Pr. 525. Proof must be clear and satisfactory. *Jones v. Jones*, 71 Hun, 519, 54 State Rep. 885, 24 N. Y. Supp. 1031.

⁴¹¹ *Furman v. Furman*, 153 N. Y. 309.

⁴¹² *Phelps v. Baker*, 60 Barb 107.

— **Failure of final to comply with interlocutory judgment.** Final judgment entered upon an interlocutory judgment, but without complying with a direction of the latter that it shall be settled as directed therein, is irregular, and should be set aside on motion.⁴¹³

— **Unauthorized appearance of attorney.** The early case of *Denton v. Noyes*,⁴¹⁴ decided in 1810, is the leading case on the question of the effect of a judgment rendered by a court of general jurisdiction against a party not served with process, but for whom an attorney of the court appeared, though without authority. It was then held that such a judgment is neither void nor irregular and cannot be collaterally attacked, though relief may be granted on motion, either by setting aside the judgment absolutely, or by staying proceedings and permitting the party to come in and defend the action.⁴¹⁵ The doctrine of *Denton v. Noyes* has been held to be *stare decisis* in cases where it is strictly applicable, but the court of appeals has refused to extend the doctrine of that case to cases fairly and reasonably distinguishable, as where a defendant against whom judgment was obtained on an unauthorized appearance was a nonresident during the pendency of the proceedings and was not within the jurisdiction.⁴¹⁶ Where a motion is made to set aside a judgment because of the unauthorized appearance of an attorney, the relief granted will depend on whether the attorney is insolvent. If he is, the judgment will be vacated absolutely and set aside, while if he is solvent, the proceedings will be merely stayed and the party permitted to come in and defend.⁴¹⁷ A motion, rather than an equitable action, is the proper mode of obtaining relief from a judgment against a defendant not served with process but for whom an

⁴¹³ *Kerr v. Dildine*, 14 Civ. Proc. R. (Browne) 176, 15 State Rep. 616, 28 Wkly. Dig. 481.

⁴¹⁴ *Denton v. Noyes*, 6 Johns. 296. Followed in *Brown v. Nichols*, 42 N. Y. 35; *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, and many other cases.

⁴¹⁵ See, also, *Abbott v. Blohm*, 54 App. Div. 422, 66 N. Y. Supp. 838.

⁴¹⁶ *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440.

⁴¹⁷ *Campbell v. Bristol*, 19 Wend. 101; *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440, 454.

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attorney has appeared without authority, unless special circumstances exist which may render the remedy by motion inadequate or incomplete.⁴¹⁸

—**Mistake, inadvertence, surprise, or excusable neglect.** This ground is named in section 724 of the Code.⁴¹⁹ These terms do not seem to have been defined and there is no clear line of demarcation between them. An illustration of mistake was where an amendment of the complaint was refused, and the complaint dismissed, on the supposition that a new action could be brought, which in fact was precluded by limitation, and it was held that a motion to vacate the judgment was properly granted.⁴²⁰ But an offer of judgment and acceptance consummated by the entry of judgment thereon, and its payment, constitute an executed contract which the court may not set aside on motion without the consent of the parties, because of an alleged mistake in computing the amount.⁴²¹ Negligence or mistake of counsel may warrant the setting aside of the judgment,⁴²² and failure of the attorney to appear whereupon a default is suffered is ground for setting aside.⁴²³ But the mere fact that the attorney for defendant failed to put in any evidence, where it is not shown that defendant had any evidence, nor that the case was submitted without the full knowledge and consent of defendant, nor that the attorney was guilty of any bad faith or actual misconduct, is not ground for vacating the judgment on motion.⁴²⁴ And where judgment has been rendered against a defendant, with his

⁴¹⁸ *Vilas v. Plattsburgh & M. R. Co.*, 123 N. Y. 440.

⁴¹⁹ Mistake as ground. *Reed v. Loucks*, 61 How. Pr. 434; *Galligan v. Galligan*, 73 App. Div. 71, 76 N. Y. Supp. 786. Excusable neglect or surprise as ground. *Mann v. Provost*, 3 Abb. Pr. 446; *Born v. Schrenk-eisen*, 52 Super. Ct. (20 J. & S.) 219; *Carlisle v. Barnes*, 45 Misc. 6, 90 N. Y. Supp. 810. See, also, ante, § 1931.

⁴²⁰ *Patterson v. Hochster*, 21 App. Div. 432, 47 N. Y. Supp. 553.

⁴²¹ *Stilwell v. Stilwell*, 81 Hun, 392, 30 N. Y. Supp. 961.

⁴²² *Ferguson v. Bruckman*, 18 App. Div. 358, 46 N. Y. Supp. 23; *Patterson v. Hochster*, 21 App. Div. 432, 47 N. Y. Supp. 553; *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656.

⁴²³ *Atkinson v. Abraham*, 78 App. Div. 498, 79 N. Y. Supp. 680.

⁴²⁴ *Early v. Bard*, 93 App. Div. 476, 87 N. Y. Supp. 650.

consent, on compromise of a claim, he cannot have it vacated on the ground that he acted on the erroneous advice of counsel, in the absence of proof of fraud.⁴²⁵ The party seeking relief must have merits and show that injustice might follow a denial of his application;⁴²⁶ and the judgment will not be vacated where the result thereof will be to affect, impair, or destroy vested rights of third persons.⁴²⁷

§ 2021. Who may move.

Ordinarily only a party or his representative may move to set aside a judgment.

— **Party.** A motion to set aside a final judgment, rendered in a court of record, for “error in fact,” not arising upon the trial, may be made by the party against whom it is rendered; or, if an execution has not been issued thereon, and the judgment has not been wholly or partly satisfied or enforced, by the party in whose favor it is rendered.⁴²⁸

— **Person not a party.** The Code provides that a motion may be made, either before or after the death of the defendant, by a person, who is not a party, to set aside, for “error in fact,” not arising upon the trial, a judgment, rendered in an action against a tenant for life, or for years, awarding real property, or the possession of real property, in which the person making the motion has an estate, or interest, in reversion or remainder.⁴²⁹

A stranger or a creditor at large cannot ordinarily move to

⁴²⁵ *Anderson v. Carr*, 54 Hun, 634, 7 N. Y. Supp. 281.

⁴²⁶ *Jospe v. Lighte*, 22 Misc. 146, 48 N. Y. Supp. 645.

⁴²⁷ *National Broadway Bank v. Hitch*, 66 Hun, 401, 21 N. Y. Supp. 395.

⁴²⁸ Code Civ. Proc. § 1283. “Successful” party may move. *Montgomery v. Ellis*, 6 How. Pr. 326. The granting of an application by plaintiff to have a judgment in his favor set aside is in the discretion of the court, and where it appeared that the judgment would bar a suit in another state, begun on the same day as the one in question, and that defendant had made an assignment here, it was properly allowed. *Graef v. Bernard*, 7 Misc. 246, 58 State Rep. 21, 27 N. Y. Supp. 263.

⁴²⁹ Code Civ. Proc. § 1285.

set aside the judgment,⁴³⁰ especially for defects or irregularities in obtaining judgment, not affecting the jurisdiction of the court, and involving no fraud or collusion, since the remedy is given to the party alone, and another judgment creditor is not entitled to have such proceedings or judgment set aside.⁴³¹ And a senior judgment creditor cannot move to set aside a junior judgment, but he may have the sale on an execution issued in such case set aside as to property which he has a right to have sold under his senior judgment.⁴³² So where there is no want of jurisdiction, a subsequent execution creditor has no standing in court to move to vacate a judgment because a prior judgment creditor had entered his judgment in the city court for over \$2,000.⁴³³ However, a motion by a junior judgment creditor of a firm to set aside as fraudulent a senior judgment entered on confession may be made even if the moving parties were not creditors of the firm which confessed the judgment where one of the defendants under each judgment is a member of both firms.⁴³⁴ And there are no limitations on the inherent power of the court to open a judgment on the application of anyone.⁴³⁵

— **After death of party.** A motion may be made for “error in fact” not arising on the trial, after the death of a party entitled to make it, by the following persons:

1. Where the judgment awards a sum of money, or a chattel, or an interest in real property, which is declared by law

⁴³⁰ *Wintringham v. Wintringham*, 20 Johns. 296; *Bump v. Piercy*, 4 N. Y. Leg. Obs. 423; *Matter of Beers*, 28 Super. Ct. (5 Rob.) 643.

⁴³¹ *Gere v. Gundlach*, 57 Barb. 13. An application by a stranger, to be allowed to be made a defendant, and to have judgment set aside for fraud and collusion, should not be granted in order that he may litigate plaintiff's claim, and set up a claim against the original defendants adverse to and exclusive of that of the plaintiff, where the applicant has a separate action for the purpose, pending and ready for trial. *Scheidt v. Sturgis*, 23 Super. Ct. (10 Bosw.) 606.

⁴³² *Citizens' Nat. Bank v. Allison*, 37 Hun. 135.

⁴³³ *Roof v. Meyer*, 2 How. Pr., N. S., 20, 8 Civ. Proc. R. (Browne) 60.

⁴³⁴ *Utter v. McLean*, 53 Hun. 568, 6 N. Y. Supp. 281.

⁴³⁵ *Ladd v. Stevenson*, 112 N. Y. 325, where the moving party was one bound by a *lis pendens* filed.

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to be assets, the motion may be made by his executor or administrator.

2. Where the judgment awards real property, or the possession thereof, or where the title to or an estate or interest in real property is determined or affected thereby, the motion may be made by the heir of the decedent, to whom the real property descended, or might have descended, or by the person to whom he devised it.

3. Where the judgment is rendered against or in favor of two or more persons, the motion may be made, jointly, by the survivor, and the person who would have been entitled to make it, if the judgment had been rendered in favor of or against the decedent only.⁴³⁶

Where a party entitled to move to set aside a final judgment for error in fact dies before the expiration of the time within which the motion may be made, the court may allow the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.⁴³⁷

—Where several persons are entitled to move. Where two or more persons are entitled to move to set aside a judgment, as prescribed in the sections of the Code set forth in this section, one or more of them may move separately; but, in that case, notice of the motion must be given to those who do not join therein, in like manner as if they were adverse parties.⁴³⁸

§ 2022. Time for motion.

The Code fixes the time limit for a motion to vacate as dependent on whether the motion is based on (1) an irregularity, (2) an error in fact, or (3) mistake, surprise, excusable neglect, etc. Neither of these Code provisions, however, apply to special proceedings.⁴³⁹ And a motion to set aside a judgment because of fraud is based on neither an irregularity nor an error in fact and hence there is no fixed time limitation

⁴³⁶ Code Civ. Proc. § 1284.

⁴³⁷ Code Civ. Proc. § 786.

⁴³⁸ Code Civ. Proc. § 1286.

⁴³⁹ Matter of Buffalo, 78 N. Y. 362.

for the motion,⁴⁴⁰ although the motion may be denied for laches,⁴⁴¹ as may a motion based on any other ground though made within the time limit. Where the delay has not changed the situation of the parties to be affected by the vacation of the judgment, the motion should not be denied.⁴⁴² Junior judgment creditors are not precluded from moving, by the laches of defendant in not moving, if the judgment is void against them.⁴⁴³ Where a party moves to vacate "as a matter of right" he need not move at the first opportunity.⁴⁴⁴ A judgment has been vacated thirteen years after its entry.⁴⁴⁵ After affirmance by the appellate division, a motion to vacate will not be granted,⁴⁴⁶ although a motion to vacate has been held properly granted even after the judgment is satisfied, to allow an amendment authorizing a larger recovery.⁴⁴⁷

—**Motion based on irregularity.** A motion to set aside a "final" judgment, for irregularity, shall not be heard, after the expiration of one year since the "filing of the judgment roll," unless notice thereof is given for a day within the year, and either the hearing is adjourned, by one or more orders, until after the expiration of the year, or the term, for which it is thus notice, is not held. In the latter event, the motion may be renoticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.⁴⁴⁸ This provision does not apply to jurisdictional objections,⁴⁴⁹ as

⁴⁴⁰ *Furman v. Furman*, 153 N. Y. 309; *Julian v. Woolsey*, 87 Hun, 326, 34 N. Y. Supp. 321; *Hurlbut v. Coman*, 43 Hun, 586; *McCloud v. Meehan*, 30 Misc. 67, 62 N. Y. Supp. 852.

⁴⁴¹ Delay of eighteen months held fatal. *Jones v. Jones*, 71 Hun, 519, 24 N. Y. Supp. 1031.

⁴⁴² *Vilas v. Butler*, 123 N. Y. 440.

⁴⁴³ *Bridenbecker v. Mason*, 16 How. Pr. 203.

⁴⁴⁴ *De Graff v. Hoyt*, 4 T. & C. 348.

⁴⁴⁵ *Vanderburgh v. New York City*, 25 State Rep. 802, 5 N. Y. Supp. 664.

⁴⁴⁶ *Schweizer v. Raymond*, 6 Abb. N. C. 378.

⁴⁴⁷ *Hatch v. Central Nat. Bank*, 78 N. Y. 487. Followed in *McCredy v. Woodcock*, 41 App. Div. 526, 58 N. Y. Supp. 656.

⁴⁴⁸ Code Civ. Proc. § 1282.

⁴⁴⁹ *Hallett v. Righters*, 13 How. Pr. 43; *Weeks v. Merritt*, 28 Super.

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where a judgment is entered without authority, against a party not before the court.⁴⁵⁰ So a judgment in foreclosure for a deficiency, where the complaint merely asked for a sale, is not merely irregular, but is void or voidable as unauthorized, and the right to move to have it vacated is not limited to one year.⁴⁵¹ A judgment is not merely irregular where it stands in the way of a substantive right and is subversive of it.⁴⁵² But a motion to set aside a judgment ordered upon the pleadings, on the ground that no order for judgment had been entered, is a motion for irregularity,⁴⁵³ as is a motion based on defects in the service of the summons or complaint.⁴⁵⁴ It seems that this Code provision is mandatory and that the motion must be made within the year,⁴⁵⁵ though the motion may be denied for laches notwithstanding the motion is made within the year, since a motion founded on an irregularity should be made at the first opportunity.⁴⁵⁶

—**Motion based on error in fact.** A motion to set aside a final judgment, for error in fact, not arising upon the trial, shall not be heard, except as specified in the next paragraph, after the expiration of two years since the “filing of the judgment roll,” unless notice thereof is given, for a day within the two years, and either the hearing is adjourned, by one or more orders, until after the expiration of the two years, or the term, for which it is thus noticed, is not held. In the latter event, the motion may be renoticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.⁴⁵⁷ This

Ct. (5 Rob.) 610. A motion to cancel a judgment because of failure to serve summons may be heard at any time. *Meurer v. Berlin*, 80 App. Div. 294, 80 N. Y. Supp. 240.

⁴⁵⁰ *Dederick v. Richley*, 19 Wend. 108.

⁴⁵¹ *Simonson v. Blake*, 12 Abb. Pr. 331, 20 How. Pr. 484.

⁴⁵² *Simpson v. McKay*, 3 T. & C. 65, 72.

⁴⁵³ *Whitehead v. Pecare*, 9 How. Pr. 35.

⁴⁵⁴ *Van Benthuyssen*, 8 How. Pr. 312.

⁴⁵⁵ *Corn Exch. Bank v. Blye*, 119 N. Y. 414.

⁴⁵⁶ *Cagger v. Gardner*, 1 How. Pr. 142; *Orleans County Nat. Bank v. Spencer*, 19 Hun, 569. Unexplained delay is a good reason for denying the motion. *Henderson v. Savage*, 46 Super. Ct. (14 J. & S.) 221.

⁴⁵⁷ Code Civ. Proc. § 1290.

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section refers merely to parties and not to strangers.⁴⁵⁸ It does not preclude the court, after the lapse of two years, from opening a judgment for the purpose of supplying an inadvertent omission of a finding, as distinguished from correcting an error in fact.⁴⁵⁹

If a person, against whom the judgment is rendered, is, at the time of filing the judgment roll, either

1. Within the age of twenty-one years; or

2. Insane; or

3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offense, for a term less than for life.

The time of such a disability is not a part of the time, except that the time, within which the motion may be heard, cannot be extended more than five years by such a disability, nor, in any case, more than one year after the disability ceases.⁴⁶⁰

Where a party entitled to move to set aside a final judgment for error in fact dies before the expiration of the time within which the motion may be made, the court may allow the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.⁴⁶¹

— **Motion based on mistake, surprise, etc.** Section 724 of the Code provides, *inter alia*, that the court may, in its discretion, and upon such terms as justice requires, at any time within one year “after notice thereof,” relieve a party from a judgment taken against him through his “mistake, inadvertence, surprise, or excusable neglect.”⁴⁶² It will be noticed that the time begins to run from the time of notice of the judgment; and verbal notice of entry of judgment is insufficient.⁴⁶³ But service of a transcript of the judgment is a sufficient notice of entry.⁴⁶⁴ This Code section does not apply

⁴⁵⁸ *Marshall v. McGee*, 33 Hun, 354.

⁴⁵⁹ *Underwood v. Sutcliffe*, 21 Hun, 357.

⁴⁶⁰ Code Civ. Proc. § 1291.

⁴⁶¹ Code Civ. Proc. § 785.

⁴⁶² If judgment is served by mail, double time is allowed for the motion. *Atkinson v. Abraham*, 78 App. Div. 498, 79 N. Y. Supp. 680.

⁴⁶³ *Bissell v. New York Cent. & H. R. R. Co.*, 67 Barb. 385.

⁴⁶⁴ *Jex v. Jacob*, 7 Abb. N. C. 452, 19 Hun, 105.

to jurisdictional defects nor to special proceedings.⁴⁶⁵ However, this Code provision does not, it seems, preclude the court, in the exercise of its inherent power, from opening a judgment on such grounds after the expiration of one year.⁴⁶⁶

§ 2023. Notice of motion.

The Code provides for a notice of motion where the motion is based on an irregularity,⁴⁶⁷ or where it is based on an error in fact.⁴⁶⁸ Where the motion is based on mistake, inadvertence, surprise, or excusable neglect, the Code is silent as to the necessity of a notice of motion, but it is nevertheless necessary in such case to serve a notice of motion.

If the motion is based on an irregularity, the notice of motion must specify the irregularity. But a notice of motion to set aside a judgment for irregularity on the ground that it is improperly entered refers sufficiently to the objection that the judgment was entered without authority.⁴⁶⁹

— **To whom notice must be given.** Notice of a motion to set aside a final judgment, for "error in fact," not arising upon the trial, must be given to the adverse party, or, in case of his death, to each person who might have moved, as against the moving party, to set aside the judgment for the same cause. Where the motion is made by the party against whom the judgment is rendered, or by his heir, devisee, executor, or administrator, service of the notice, upon the attorney of record for the party, in whose favor the judgment is rendered, has the like effect as if it were served upon the party.⁴⁷⁰ If the judgment has been assigned, notice of the motion must be

⁴⁶⁵ *Matter of Buffalo*, 78 N. Y. 362.

⁴⁶⁶ *Dinsmore v. Adams*, 49 How. Pr. 238. *Contra*, *Heath v. New York Bldg. Loan Banking Co.*, 91 Hun, 170, 36 N. Y. Supp. 213.

⁴⁶⁷ Code Civ. Proc. § 1282.

⁴⁶⁸ Code Civ. Proc. § 1287. See, also, *ante*, § 2021, last sentence.

⁴⁶⁹ *Hicks v. Brennan*, 10 Abb. Pr. 304.

⁴⁷⁰ Code Civ. Proc. § 1287. Notice of motion need not be given the party personally. *Gebhard v. Gebhard*, 25 Misc. 1, 54 N. Y. Supp. 406. *Contra*, *Barheydt v. Adams*, 1 Wend. 101; *O'Neil v. Hoover*, 17 Wkly. Dig. 354.

Art. VII. Vacating or Setting Aside.—Notice of Motion.

given to the assignee.⁴⁷¹ So the receiver of the adverse party should be given notice of the motion.⁴⁷² Notice should be given to all interested.⁴⁷³ Where the judgment awards real property, or the possession thereof, or where the title to, or an estate or interest in, real property is determined or affected thereby, and the real property, or estate or interest therein, has been conveyed, by the adverse party, more than eight days before the hearing of the motion, notice of the motion must also be given to each actual occupant of the property claiming under the conveyance.⁴⁷⁴ If two or more persons are entitled to move to set aside a judgment, and one or more of them move separately, notice of the motion must be given to those who do not join therein, in like manner as if they were adverse parties.⁴⁷⁵

—**Mode of giving notice.** Notice must be given, where the motion is based on an irregularity or an error in fact, by personal service of a written notice, or of an order to show cause why the motion should not be granted; or, if a person entitled to notice cannot, with due diligence, be found within the state, in any manner which the court, or a judge thereof, directs in an order to show cause, or which the court directs in a subsequent order.⁴⁷⁶

§ 2024. Motion papers.

The motion papers must clearly set forth a ground for vacating.⁴⁷⁷ The judgment roll may form a part of the motion papers.⁴⁷⁸ A motion to set aside the judgment in an action tried by the court, because no decision in writing was filed, should not be granted without affirmative proof that none was filed, or that it cannot be found after search.⁴⁷⁹ The motion

⁴⁷¹, ⁴⁷² *Bain v. Illuminated Tile Co.*, 7 Wkly. Dig. 335.

⁴⁷³ *Matter of Beers*, 28 Super. Ct. (5 Rob.) 643.

⁴⁷⁴ Code Civ. Proc. § 1288.

⁴⁷⁵ Code Civ. Proc. § 1286.

⁴⁷⁶ Code Civ. Proc. § 1289.

⁴⁷⁷ *Ellis v. Jones*, 6 How. Pr. 296.

⁴⁷⁸ *Howe Mach. Co. v. Pettibone*, 12 Hun, 657.

⁴⁷⁹ *Lewis v. Jones*, 13 Abb. Pr. 427.

papers should show actual injury if the motion is based on an irregularity but need not if the motion is based on jurisdictional defects.⁴⁸⁰ Counter affidavits may be interposed but the correctness of the entry of a judgment is not to be impugned by the party who entered it, to defeat the motion to vacate it.⁴⁸¹

§ 2025. Waiver of motion.

Taking an appeal does not waive a prior motion to vacate the judgment.⁴⁸²

§ 2026. Hearing.

If the evidence is in sharp conflict, the matter should not be decided on affidavits.⁴⁸³ Thus, a judgment should not be set aside on motion on the ground that it has been satisfied, if the evidence is conflicting.⁴⁸⁴

— **Discretion of court.** The granting or denial of a motion to set aside a judgment is usually a matter of discretion,⁴⁸⁵ except where the motion is based on something more than a mere irregularity, in which case the granting of the motion is a matter of right. The provision of the Code authorizing the court, "in its discretion," at any time within one year after notice thereof, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, etc., means the discretion "of the court," and while it

⁴⁸⁰ *Lambert v. Converse*, 22 How. Pr. 265.

⁴⁸¹ *Towle v. De Witt*, 7 Hun, 93.

⁴⁸² *Clumpha v. Whiting*, 10 Abb. Pr. 448; *Patterson v. Hochster*, 21 App. Div. 432, 47 N. Y. Supp. 553.

⁴⁸³ Where upon an application to a court by motion, a party seeks to be relieved from deficiency judgments aggregating a large sum, upon the ground of an oral agreement, the fact of which is sharply controverted, it is the better practice to have the question determined upon common-law evidence taken by the court or by a referee appointed for that purpose instead of deciding the fact upon affidavits. *Mutual L. Ins. Co. v. O'Donnell*, 146 N. Y. 275, 66 State Rep. 627, 2 Ann. Cas. 82.

⁴⁸⁴ *Frink v. Morrison*, 13 Abb. Pr. 80; *Van Etten v. Hasbrouck*, 4 State Rep. 803.

⁴⁸⁵ *Dutton v. Smith*, 10 App. Div. 566, 42 N. Y. Supp. 80; *Wettig v. Moltz*, 45 Super. Ct. (13 J. & S.) 389.

is to be exercised in the first instance by the court at special term it is still the discretion of the supreme court consisting of all the justices elected or appointed to that office and is the subject of review in the appellate division which may reverse an order of the special term, though it is not believed that the discretion of the special term was abused, where the appellate division reaches the conclusion that, under the circumstances disclosed in the moving papers, the moving party should have the relief asked for.⁴⁸⁶

§ 2027. Order.

The jurisdiction to set aside a judgment involves the right to give any less or minor relief, e. g., to allow a new action to be brought to review the judgment.⁴⁸⁷ Even if the application is denied, other relief may be granted the moving party. The court may add parties to the action whose interests are to be affected thereby.⁴⁸⁸ But on a motion by a defendant to set aside a judgment for want of jurisdiction, it is improper for the court to make an order on the hearing, after denying such motion, setting aside an *ex parte* order obtained by the defendant extending his time for performance under such judgment.⁴⁸⁹ And the special term, on setting aside a judgment, has no power to reverse, add to, or subtract from the decision of the referee on whose report the judgment was directed.⁴⁹⁰ Terms may be imposed whenever the granting of the motion is discretionary.⁴⁹¹

⁴⁸⁶ *Lawson v. Adams*, 89 App. Div. 303, 85 N. Y. Supp. 863.

⁴⁸⁷ *McCall v. McCall*, 54 N. Y. 541.

⁴⁸⁸ *Ladd v. Willett*, 22 Wkly. Dig. 521.

⁴⁸⁹ *Adams v. Ash*, 46 Hun. 105.

⁴⁹⁰ *Jones v. Jones*, 71 Hun. 519; *Schweizer v. Raymond*, 6 Abb. N. C. 378. Upon an application to reopen a judgment after trial upon the merits before a referee appointed to try the whole issues, an order cannot be made directing the referee to take certain testimony concerning the issues, and report with his opinion to the court; a judgment on a referee's report cannot be so reviewed. *Melville v. Matthewson*, 49 Super. Ct. (17 J. & S.) 388.

⁴⁹¹ Payment of costs and disbursements imposed. *De Marco v. Mass*, 31 Misc. 827, 64 N. Y. Supp. 768.

—**Restitution.** Where a judgment is set aside for any cause, upon motion, the court may direct and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.⁴⁹² But whether restitution shall be ordered or not is in the discretion of the court.⁴⁹³

—**Effect.** An order vacating a judgment destroys its effect as a bar or estoppel and if execution has been issued, the execution falls with the judgment.⁴⁹⁴ So a judgment which has been set aside, for insufficiency of proofs as the basis of an order for service by publication, is no longer valid, so as to protect any persons for acts done under it, except mere ministerial officers. It is no protection to a person not a party to the suit, who delivered up to the receiver appointed therein, property, which, as a bailee, he was bound to keep for his bailor.⁴⁹⁵ But if, after the lien has been suspended by an order vacating the judgment, such order is, in turn, vacated, the lien is revived, as though it had never been suspended; and where no new rights have been acquired by other judgment creditors, by proceedings under their several judgments, all parties are restored to their original rights.⁴⁹⁶ If the judgment has been assigned and is thereafter vacated, the transfer does not pass the cause of action unless the latter was transferable before the judgment was recovered.⁴⁹⁷ Opening a judgment against a firm, based on an indebtedness of the firm, on the motion of one of the partners, vacates the judgment as to all the firm in so far as the rights of an intermediate attaching creditor are concerned, where the defense that the firm was never indebted is successful.⁴⁹⁸

⁴⁹² Code Civ. Proc. § 1292.

⁴⁹³ *Parker v. Lythgoe*, 38 State Rep. 887, 14 N. Y. Supp. 528.

⁴⁹⁴ *Spaulding v. Lyon*, 2 Abb. N. C. 203; *May v. Cooper*, 24 Hun, 7.

⁴⁹⁵ *Welles v. Thornton*, 45 Barb. 390.

⁴⁹⁶ It would be otherwise of bona fide purchasers intervening, while the judgment appeared to be vacated, and they were without notice of the order of reversal. *King v. Harris*, 34 N. Y. 330.

⁴⁹⁷ Code Civ. Proc. § 1912.

⁴⁹⁸ *Phillips v. Wheeler*, 16 Abb. Pr. (N. S.) 242, 6 T. & C. 306.

ART. VIII. ASSIGNMENT.

§ 2028. Judgment as assignable.

A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred; but if it is vacated or reversed, the transfer thereof does not transfer the cause of action, unless the latter was transferable before the judgment was recovered.⁴⁹⁹

§ 2029. Acknowledgment of assignment.

A person, who has heretofore executed, or hereafter executes, a written assignment of a judgment, owned by him, without acknowledging the execution thereof, before an officer authorized to take the acknowledgment of a deed, must so acknowledge it, at the request of his assignee, or of a subsequent assignee thereof, or of the judgment debtor, upon presentation of the assignment, and payment of the officer's fees.⁵⁰⁰

§ 2030. Filing of notice of ownership.

A resident of the state, or a person having an office within the state, for the regular transaction of business, in person, who becomes the owner of a judgment by virtue of a general assignment for the benefit of creditors, or of an appointment as a receiver, or trustee or assignee of an insolvent debtor or bankrupt, may file with the clerk, in whose office the judgment roll is filed, a notice of the assignment, or of his appointment, and of his ownership of the judgment. The notice must be subscribed by him, adding to his signature his place of residence, and also, if he resides without the state, his office address. A notice so filed has the same force and effect as if it was an assignment of the judgment.⁵⁰¹

§ 2031. Filing and noting on docket.

Upon the presentation, to the clerk of a court of record, of

⁴⁹⁹ Code Civ. Proc. § 1912.

⁵⁰⁰ Code Civ. Proc. § 1262.

⁵⁰¹ Code Civ. Proc. § 1263.

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an assignment of a judgment, entered in his office, executed by a person entitled to satisfy the judgment, as prescribed in section one thousand two hundred and sixty of the Code, and otherwise executed as prescribed in that section, with respect to a satisfaction-piece, and upon payment of the fees, allowed by law, for filing a transcript, and docketing a judgment thereupon, the clerk must forthwith file the assignment in his office, and make, upon the docket of the judgment, an entry of the fact, and of the day of filing, or, if he keeps a separate book for the entry of assignments of judgments, an entry, referring to the page of the book, where the filing of the assignment is noted.⁵⁰²

Form of assignment.

This indenture, made the —— day of ——, in the year one thousand nine hundred and ——, between ——, and ——,

Whereas, on the —— day of ——, in the year one thousand nine hundred and ——, judgment was entered in the —— in favor of —— and against —— in the sum of —— dollars,

Now this indenture witnesseth, that the said party of the first part, in consideration of —— to him duly paid, has sold, and by these presents does assign, transfer, and set over unto the said party of the second part, and his assigns, the said judgment, and all sum or sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon. And the said party of the first part does hereby constitute and appoint the said party of the second part, and his assigns, his true and lawful attorney irrevocable, with power of substitution and revocation, for the use and at the proper costs and charges of the said party of the second part, to ask, demand, and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment; and on payment to acknowledge satisfaction, or discharge the same. And attorneys, one or more under him, for the purpose aforesaid, to make and substitute, and at pleasure to revoke; hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises. And the said party of the first part does covenant, that there is now due on the said judgment the sum of ——, and that he will not collect or receive the same, or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings thereon, the said party of

⁵⁰² Code Civ. Proc. § 1270.

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the second part saving the said party of the first part harmless of and from any costs in the premises.

In witness whereof, the party of the first part, has hereunto set his hand and seal the day and year first above written.

Sealed and delivered in the presence of

[Acknowledgment.]

[Signature.]

— Short form.

[Title of cause.]

Judgment for ——— dollars damages and ——— dollars costs, docketed in ——— county, the ——— day of ———, 190—, in favor of ———.

For value received, I do hereby assign and set over the above-mentioned judgment to ———, for his use, and at his risk, costs and charges in all respects.

[Signature, etc., as in preceding form.]

ART. IX. DISCHARGE AND SATISFACTION.

§ 2032. General considerations.

A judgment may be satisfied or discharged in various ways. Payment, release of a joint debtor, a levy on sufficient property under an execution, the taking of the body of defendant under a body execution, etc., as discharging the judgment will be considered hereafter. The conclusive presumption after twenty years that the judgment has been satisfied has been treated of in volume one.⁵⁰³ In the present connection all that will be considered is the mode of canceling the judgment of record after it has been satisfied. The Code provisions referred to herein apply only to a judgment wholly or partly for a sum of money or directing the payment of a sum of money, and to an execution issued on such a judgment.⁵⁰⁴

§ 2033. Discharge of judgment against bankrupt.

The Code provides as follows: “At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he

⁵⁰³ Volume 1, p. 466.

⁵⁰⁴ Code Civ. Proc. § 1272.

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may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien^{504a} on property owned by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application accompanied with copies of the papers, upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in sections 796 and 797 of the Code, if the residence or place of business of such creditor, or his attorney is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this state, and his attorney is dead, removed from, or cannot be found within the state, upon proof of said facts by affidavit, a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment creditor, of the application.⁵⁰⁵ This Code section applies only to judgments entered before the discharge in bankruptcy.⁵⁰⁶ It applies to

^{504a} That no lien exists on property fraudulently conveyed before judgment, see *Matter of David*, 44 Misc. 516, 90 N. Y. Supp. 85.

⁵⁰⁵ Code Civ. Proc. § 1268.

⁵⁰⁶ *Sands v. Perry*, 38 Hun, 268.

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judgments entered against the bankrupt in favor of the people.⁵⁰⁷ Laches in moving will not preclude relief;⁵⁰⁸ and failure to move to cancel will not revive the judgment.⁵⁰⁹ The right is absolute,⁵¹⁰ provided the bankruptcy act is shown to have been complied with.^{510a} But the statute does not entitle a partner, having got a discharge in individual proceedings, to cancel as against himself a judgment against his firm.⁵¹¹ The pendency of an action by an attorney to enforce his lien on the judgment does not preclude relief notwithstanding judgment in favor of the lien was rendered after the discharge in bankruptcy.⁵¹² The validity of the discharge may be questioned and determined.⁵¹³ The discharge must be unconditional,⁵¹⁴ except that the order must preserve any lien on real property created by the judgment.⁵¹⁵ This Code provision was not intended to enlarge the scope of the federal bankruptcy act by rendering null and void a lien which had been acquired in good faith

⁵⁰⁷ *Matter of Brandreth*, 14 Hun, 585.

⁵⁰⁸ *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Eberspacher v. Boehm*, 33 State Rep. 792, 11 N. Y. Supp. 404.

⁵⁰⁹ *Leo v. Joseph*, 31 State Rep. 152, 9 N. Y. Supp. 612.

⁵¹⁰ *Townsend v. Simpson*, 62 How. Pr. 506, 13 Wkly. Dig. 450; *Arnold v. Oliver*, 2 Civ. Proc. R. (Browne) 457, 64 How. Pr. 452, 28 Hun, 324.

^{510a} Where it is shown the debt has not been duly scheduled, the court may refuse to cancel the judgment. For instance while the fact that the address was given in bankruptcy schedules as unknown does not, per se, invalidate the discharge, yet where it is shown that the address was scheduled as unknown to evade the duty of giving notice and no notice was given, the judgment will not be canceled. *Feldmark v. Weinstein*, 45 Misc. 329, 90 N. Y. Supp. 478. To same effect, *Woodward v. Schaefer*, 91 N. Y. Supp. 104. See, also, *In re David*, 44 Misc. 516, 90 N. Y. Supp. 85.

⁵¹¹ *Trimble v. More*, 47 Super. Ct. (15 J. & S.) 340.

⁵¹² *Blumenthal v. Anderson*, 91 N. Y. 171.

⁵¹³ The proper practice in such case is to order a reference to take and report the evidence with the opinion of the referee. *Crouse v. Whittlesey*, 40 State Rep. 133, 61 Hun, 622, 15 N. Y. Supp. 851. See, also, ante, note 510a.

⁵¹⁴ *Fellows v. Kittredge*, 56 How. Pr. 498.

⁵¹⁵ *Popham v. Barretto*, 20 Hun, 299. See, also, *Arnold v. Treviranus*, 78 App. Div. 589, 79 N. Y. Supp. 732; *In re David*, 44 Misc. 516, 90 N. Y. Supp. 85.

more than four months prior to the commencement of the bankruptcy proceedings.⁵¹⁶

§ 2034. Satisfaction piece.

The docket of a judgment must be canceled and discharged by the clerk, in whose office the judgment roll is filed, upon filing with him a satisfaction piece, describing the judgment, and executed as follows:

1. Except as otherwise prescribed in the next subdivision, the satisfaction piece must be executed by the party, in whose favor the judgment was rendered, or his executor or administrator; or, if it is made within two years after the entry of the judgment by the attorney of record of the party. But where the authority of the attorney has been revoked, a satisfaction by him is not conclusive, against the person entitled to enforce the judgment, in respect to a person who had actual notice of the revocation, before a payment on the judgment was made, or a purchase of property bound thereby was effected.

2. If an assignment of the judgment, executed by the party in whose favor it was rendered, or his executor or administrator, has been filed in the clerk's office, the satisfaction piece must be executed by the person, who appears, from the assignment, or from the last of the subsequent assignments, if any, so filed, showing a continuous chain of title, to be the owner of the judgment, or by his executor or administrator.

3. If the satisfaction piece is executed by an attorney in fact, in behalf of a person authorized to execute it, other than the attorney of record, an instrument, containing a power to acknowledge the satisfaction, must be filed with the satisfaction piece, unless it has been recorded, in the proper book for recording deeds, in that or another county; in which case, the satisfaction piece must refer to the record, and the clerk may, for his own indemnity, require evidence of a record remaining in another office.

The execution of each satisfaction piece or power of attorney

⁵¹⁶ *Pickert v. Eaton*, 81 App. Div. 423, 81 N. Y. Supp. 50.

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must be acknowledged, before the clerk, or his deputy, and certified by him thereupon; or it must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where it is filed.⁵¹⁷

An instrument executed by a creditor to one of several joint debtors as a release of the indebtedness is deemed a satisfaction piece, for the purpose of discharging the docket of a judgment to recover upon an indebtedness released or discharged thereby, as far as the judgment affects the compounding debtors. Where the docket of a judgment was discharged thereupon, a special entry must be made on the docket to the effect that the judgment is satisfied, as to the compounding debtor only.⁵¹⁸

The person entitled to enforce a judgment must execute and acknowledge before the proper officer a satisfaction piece thereof, at the request of the judgment debtor, or of a person interested in property bound by the judgment, upon presentation of a satisfaction piece, and payment of the sum due upon the judgment, and the fees allowed by law for taking the acknowledgment of a deed.⁵¹⁹

⁵¹⁷ Code Civ. Proc. § 1260. It seems that it is the duty of the clerk to satisfy a judgment in favor of several, on receiving a satisfaction piece executed by one only. *People v. Keyser*, 28 N. Y. 226. The clerk is authorized to cancel and discharge the docket of a judgment, upon the filing with him of an acknowledgment of satisfaction signed by the party in whose favor the judgment is obtained, and authenticated in the manner required. Without this, his act in canceling the docket is without jurisdiction, and void as to the parties whose rights purport to be affected by it. It is incumbent on parties who propose to act on the faith of statements made in the docket, to see that the clerk had due authority to make the entries. *Booth v. Farmers' & Mechanics' Nat. Bank*, 4 Lans. 301, 65 Barb. 457.

⁵¹⁸ Code Civ. Proc. § 1943.

⁵¹⁹ Code Civ. Proc. § 1261. A judgment debtor demanding a satisfaction piece is bound to offer the instrument to be executed, to the creditor, and to offer to pay the expenses of its execution. *Pettengill v. Mather*, 16 Abb. Pr. 399. One who refused to execute a satisfaction piece was ordered to do so at his own expense, with costs of motion. *Briggs v. Thompson*, 20 Johns. 294. Delivery of a satisfaction piece, retained by the judgment creditor till his death, by his executor, is

Art. 1X. Discharge and Satisfaction.

An attorney cannot satisfy the judgment without payment in full, except by express authority.⁵²⁰

— Form of satisfaction piece.

[Title of court and cause.]

[Venue.]

Whereas, a judgment was, on the — day of —, 190—, recovered by the —, — against the —, —, in the above-entitled action for the sum of — dollars, which judgment was, on the — day of —, 190—, duly entered in the judgment book in the office of the clerk of the above-named court in the county of —, and said judgment has been wholly paid, therefore, satisfaction of said judgment is hereby acknowledged, and the clerk of said court is hereby authorized and directed to cancel and discharge the same.

[Acknowledgment.]

[Signature.]

— Another form.

[Title of court and cause.]

[Venue.]

Satisfaction of a judgment in this court, entered in the above entitled action in favor of —, against —, for the sum of — is hereby acknowledged. Judgment entered in the judgment book of the clerk of the — court in the county of — the — day of —, 190—, on which day the judgment roll thereon was filed and said judgment docketed in said county clerk's office.

[Acknowledgment.]

[Signature.]

§ 2035. On return of execution.

Where an execution is returned, wholly or partly satisfied, the clerk must make an entry of the satisfaction, or partial satisfaction, in the docket of the judgment upon which it was

ineffectual. *Earley v. St. Patrick's Church Soc.*, 81 Hun, 369, 63 State Rep. 235, 30 N. Y. Supp. 979.

⁵²⁰ *Benedict v. Smith*, 10 Paige, 126; *Beers v. Hendrickson*, 45 N. Y. 665; *Lowman v. Elmira, C. & N. R. Co.*, 85 Hun, 188, 65 State Rep. 723, 32 N. Y. Supp. 579; *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. Supp. 1002. Satisfaction by an attorney after the death of his client, though within two years after its entry, for a less amount than the recovery, discharges the judgment only to the extent of the costs included therein, and as to the residue the judgment debtor remains liable, with interest thereon from the date of entry. *Wood v. City of New York*, 44 App. Div. 299, 60 N. Y. Supp. 759.

Art. IX. Discharge and Satisfaction.

issued. Thereupon the judgment is deemed satisfied, to the extent of the amount returned as collected, unless the return is vacated by the court.⁵²¹ Where an execution is returned wholly unsatisfied, the clerk must immediately make, in the docket of the judgment, upon which it was issued, an entry of the fact stating the time when the execution was returned.⁵²²

— **On filing satisfaction of execution.** A sheriff, upon being paid the full amount due upon an execution in his hands, must immediately indorse thereupon a return of satisfaction thereof. He must also deliver, to the person making the payment, upon the latter's request, and the payment of the fees allowed by law therefor, a certified copy of the execution, and of the return of satisfaction thereupon, which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket of the judgment, as if the judgment roll was filed in his office, and the execution was returned to him, as satisfied. But this section does not exonerate the sheriff, from his duty to return the execution, to the clerk with whom the judgment roll is filed.⁵²³

§ 2036. Cancellation of docket in other counties.

The clerk of a county, with whom a judgment has been docketed, must cancel and discharge the docket thereof, upon the filing, with him, of a certificate of the clerk, with whom the judgment roll is filed, showing that the judgment has been reversed, vacated, or satisfied of record; or the certificate of the clerk of the county, with whom a copy of an execution, and of a return of satisfaction thereupon, have been filed, as prescribed in the last section, showing that they have been so filed, and the docket canceled and discharged accordingly.⁵²⁴

⁵²¹ Code Civ. Proc. § 1264. But the court will not order satisfaction of a judgment to be entered of record until the money realized from an execution sale is paid to plaintiff, but where the money was received by a deputy, the court, to save plaintiff's remedy against sheriff, will stay all proceedings against defendant. *Hamlin v. Boughton*, 4 Cow. 65.

⁵²² Code Civ. Proc. § 1265.

⁵²³ Code Civ. Proc. § 1266.

⁵²⁴ Code Civ. Proc. § 1267.

§ 2037. Vacation of satisfaction.

A satisfaction of a judgment may be vacated in case of a clear mistake by the clerk⁵²⁵ or in case of collusion,⁵²⁶ but the granting of relief on a motion is discretionary.⁵²⁷ The satisfaction may also be set aside on an agreement by the parties.⁵²⁸ A plaintiff who satisfies of record a judgment in his favor upon payment of what he supposes due thereon cannot afterwards have the satisfaction canceled, on motion, to enable the sheriff to collect his fees, on the ground of a mistake, without returning or offering to return the amount received on the judgment.⁵²⁹ The judgment in an action to cancel the satisfaction of a judgment should restore the parties to the position originally occupied.⁵³⁰

ART. X. ACTIONS ON JUDGMENTS.

§ 2038. Domestic judgments.

The Code provides as follows: "Except in a case where it is otherwise specially prescribed in the Code, an action upon a judgment for a sum of money, rendered in a court of record of the state, cannot be maintained, between the original parties to the judgment, unless, either:

1. Ten years have elapsed since the docketing of such judgment; or

2. It was rendered against the defendant by default, for want of an appearance or pleading, and the summons was served upon him, otherwise than personally; or

3. The court in which the action is brought has previously made an order, granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court that personal

⁵²⁵ *Mechanics' Bank v. Minthorne*, 19 Johns. 244.

⁵²⁶ *Wardel v. Eden*, 2 Johns. Cas. 500.

⁵²⁷ *Concklin v. Taylor*, 68 N. Y. 221.

⁵²⁸ *Berdell v. Parkhurst*, 6 State Rep. 12.

⁵²⁹ *Bensen v. Perry*, 17 Hun, 16.

⁵³⁰ *Kley v. Healy*, 149 N. Y. 346.

Art. X. Actions on Judgments.—Domestic Judgments.

notice cannot be given with due diligence, in which case notice may be given in such a manner as the court directs.⁵³¹

This Code provision, it will be noticed, applies only to judgments of a court of record,⁵³² and does not apply to judgments recovered in the federal courts in this state.⁵³³ Furthermore, it applies only to actions between the original parties to the judgment, and hence leave to sue is not necessary where an action is brought by an assignee of the judgment⁵³⁴ or by the personal representatives of the deceased judgment creditor.⁵³⁵ And an action against two defendants alleging the recovery of a former judgment on process served on only one of them, and setting out the joint obligation and serving process only on the defendant not served in the former action, is not an action upon a judgment within the meaning of this Code section.⁵³⁶ The judgment on which an action may be brought, on leave obtained, must be not only a final judgment, but one on which an execution can be issued and for a sum of money, so that the amount to be paid, and the circumstances under which it is to be paid, are fixed by the judgment.⁵³⁷ If a judgment of a justice of the peace has been docketed in the county clerk's office, the leave to sue can only be made by the court in which the action is brought and no action can thereafter be brought on it in the justice's court.⁵³⁸ Whether the objection that plaintiff in an action upon a judgment has not ob-

⁵³¹ Code Civ. Proc. § 1913.

⁵³² *Harris v. Clark*, 65 Hun, 361, 20 N. Y. Supp. 232.

⁵³³ *Morton v. Palmer*, 39 State Rep. 236, 21 Civ. Proc. R. (Browne) 94, 14 N. Y. Supp. 912; *Goodyear Dental Vulcanite Co. v. Frisselle*, 22 Hun, 174.

⁵³⁴ *McGrath v. Maxwell*, 17 App. Div. 246, 45 N. Y. Supp. 587; *Carpenter v. Butler*, 29 Hun, 251.

⁵³⁵ *Smith v. Britton*, 2 T. & C. 498; *Kellogg v. Stoddard*, 40 Misc. 92, 81 N. Y. Supp. 271.

⁵³⁶ *Dean v. Eldridge*, 29 How. Pr. 218.

⁵³⁷ *Hanover F. Ins. Co. v. Tomlinson*, 3 Hun, 630; *MacDougall v. Hoes*, 27 Misc. 590, 58 N. Y. Supp. 209. Where the value of use and occupation of premises had to be ascertained in order to enforce the judgment, leave to sue under section 1913 should be denied. *Matter of Van Beuren*, 33 App. Div. 158, 53 N. Y. Supp. 349, 6 Ann. Cas. 193.

⁵³⁸ *Baldwin v. Roberts*, 30 Hun, 163.

tained leave to sue is waived unless raised by demurrer or answer,⁵³⁹ and whether leave to bring the action may be granted *nunc pro tunc*,⁵⁴⁰ is the subject of conflicting opinion. The order granting leave to sue need not require the suit to be brought in the court in which judgment was recovered.⁵⁴¹

—**Pleading.** The better rule seems to be that the complaint must show the right to sue as by alleging the lapse of ten years or the granting of leave to sue,⁵⁴² though there are authorities to the contrary.⁵⁴³ The necessity of stating facts conferring jurisdiction, where the judgment is of an inferior court of special jurisdiction, has been considered in a preceding volume.⁵⁴⁴

§ 2039. Foreign judgments.

An action may be brought in this state on a money judgment rendered in another state⁵⁴⁵ or country⁵⁴⁶ without first obtaining leave to sue.⁵⁴⁷ But it is doubtful whether the Code section which provides that in pleading the judgment of a court of special jurisdiction, the jurisdiction may be pleaded

⁵³⁹ Is waived, *Brush v. Hoar*, 14 Civ. Proc. R. (Browne) 297. Contra, *Farish v. Austin*, 25 Hun, 430.

⁵⁴⁰ May. *Church v. Van Buren*, 55 How. Pr. 489. Contra, *Cook v. Thurston*, 18 Misc. 506, 42 N. Y. Supp. 1084.

⁵⁴¹ *National Mechanics' Banking Ass'n v. Usher*, 31 Super. Ct. (1 Sweeny) 403.

⁵⁴² *Graham v. Scripture*, 26 How. Pr. 501; *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801.

⁵⁴³ *Dean v. Eldridge*, 29 How. Pr. 218; *Prince v. Cujas*, 30 Super. Ct. (7 Rob.) 76.

⁵⁴⁴ Volume 1, p. 851.

⁵⁴⁵ *Merritt v. Fowler*, 76 Hun, 424, 27 N. Y. Supp. 1047. Assignee of judgment may sue. *Waters v. Spencer*, 44 Misc. 15, 89 N. Y. Supp. 693.

⁵⁴⁶ An action may be maintained in this state upon a foreign judgment, recovered in an action brought by plaintiff, which directs defendant to pay a specified sum of money into court, if by the laws of the country in which the judgment was recovered it has all the force and effect of a personal judgment. *Wright v. Chapin*, 31 Abb. N. C. 137, 74 Hun, 521, 56 State Rep. 718, 26 N. Y. Supp. 825.

⁵⁴⁷ *Morton v. Palmer*, 39 State Rep. 236, 14 N. Y. Supp. 912.

as a fact, applies to courts of other states and foreign countries.⁵⁴⁸

It is well settled that in an action brought in our courts on a judgment of a court of a sister state, the jurisdiction of the court to render the judgment may be assailed by proof that the appearance entered by an attorney was unauthorized, even where the proof directly contradicts the record.⁵⁴⁹ In this respect the rule is different from the rule in respect to domestic judgments. The rule is supposed to rest on the unreasonableness of compelling the party against whom a judgment has been rendered in another state on an unauthorized appearance by an attorney, to go to the foreign jurisdiction to attack it.

§ 2040. Statute of limitations.

For matter relating to the bar of limitations, see pages 466 and 477 of volume one of this work.

⁵⁴⁸ *De Nobele v. Lee*, 47 Super. Ct. (15 J. & S.) 372.

⁵⁴⁹ *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 278.

CHAPTER II.

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ART. I. WHEN ALLOWABLE.**§ 2041. General considerations.**

The time in which to answer or demur has already been stated in a preceding volume.¹ If no answer or demurrer is served within the required time, plaintiff may take judgment

¹ Volume 1, p. 937. When service of summons by publication is complete, see vol. 1, p. 781. When substituted service is complete, see vol. 1, p. 756. Extension of time to answer, see vol. 1, p. 937.

Art. I. When Allowable.—General Considerations.

by default provided the summons has been duly served or defendant has voluntarily appeared without being served.² Of course if a copy of an order extending the time to answer has been served, judgment by default cannot be entered before the expiration of the time to answer as fixed by such order though there has been no appearance.³ Summons must be served on "the defendant" before a default can be taken.⁴ And, on the other hand, judgment cannot be rendered in favor of one not named in the summons.^{4a} Of course, the court must have jurisdiction of the subject-matter. If a demurrer to the complaint has been overruled with leave to defendant to answer over, he is not in default until twenty days after the interlocutory judgment is entered.⁵

In another volume the matter of serving the complaint with the summons has been considered.⁶ Suffice it to add that service of a complaint "after" service of the summons, where not in response to a demand by defendant, is not a sufficient service of the complaint to permit plaintiffs to enter judgment in disregard of defendant's demand for a copy thereof.⁷ In other words, if the complaint is served after the summons, but not in compliance with a demand therefor, such service does not extend the time to answer until twenty days from the time of the service of the complaint.⁸

An insufficient, irregular, or unauthorized answer cannot be treated as a nullity and a judgment entered as by default. A judgment as on a default may be entered where an answer is filed but is afterwards withdrawn.⁹ But if an answer is actu-

² *Christal v. Kelly*, 88 N. Y. 285.

³ *Littauer v. Stern*, 177 N. Y. 233.

⁴ *Goldberg v. Fowler*, 29 Misc. 328, 60 N. Y. Supp. 475. Service on defendant's attorney is insufficient. *Id.*

^{4a} An additional plaintiff cannot be brought in as a party and obtain judgment against defendant, the original plaintiff being awarded a judgment for a like amount. *Korman v. Grand Lodge of the U. S.*, 44 Misc. 564, 90 N. Y. Supp. 120.

⁵ *Quereau v. Brown*, 63 Hun, 175, 17 N. Y. Supp. 644.

⁶ Volume 1, pp. 881, 727.

⁷ *Crouse v. Reichert*, 61 Hun, 46, 15 N. Y. Supp. 369.

⁸ *Paine v. McCarthy*, 1 Hun, 78.

⁹ *Christal v. Kelly*, 88 N. Y. 285.

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ally served, a default judgment cannot be entered although the answer is defective,¹⁰ since the remedy is either to return the answer or move to strike it out.¹¹ If the motion to strike is granted, plaintiff may enter judgment as if no answer had been put in.¹² An entry of judgment as for want of an answer, after service of an unfolioed answer but before its return, is irregular.¹³ So plaintiff cannot disregard a demurrer or answer as frivolous and enter judgment as on failure to answer.¹⁴ If the copy of answer served on plaintiff is not served in time, he must return the answer in order to entitle him to take judgment by default;¹⁵ and the same rule applies where the answer is served by one not named in the summons.¹⁶ A default cannot be entered until the day after the time for answering has expired,¹⁷ nor before the time allowed defendant to amend his answer.¹⁸ If other issues remain to be disposed of, final judgment should not be entered until such issues are determined.¹⁹ A default judgment may be taken a second time, after the opening of a default, where defendant fails to plead.²⁰

Inquests on failure to appear on the day set for trial have already been considered.²¹

§ 2042. Default of part of defendants.

Where summons is served on defendants alleged to be “severally” liable, plaintiff may take judgment against one or

¹⁰ *Williams v. Sholto*, 6 Super. Ct. (4 Sandf.) 641.

¹¹ *Chadwick v. Snediker*, 26 How. Pr. 60.

¹² *Aymar v. Chase*, 1 Code R. (N. S.) 141.

¹³ *De Witt v. Simons*, 5 Wkly. Dig. 307.

¹⁴ *Decker v. Kitchen*, 21 Hun, 332; *De Witt v. Swift*, 3 How. Pr. 280.

¹⁵ *Canavello v. Michael & Co.*, 31 Misc. 170, 63 N. Y. Supp. 967. To same effect, *Hoffnung v. Grove*, 18 Abb. Pr. 142; *Hoffaring v. Grove*, 42 Barb. 548.

¹⁶ *Schanz v. Martin*, 37 Misc. 492, 75 N. Y. Supp. 997.

¹⁷ *Thomas v. Douglass*, 2 Johns. Cas. 226.

¹⁸ *Washburn v. Herrick*, 2 Code R. 2, 4 How. Pr. 15.

¹⁹ *Fales v. Lawson*, 21 State Rep. 708, 710, 4 N. Y. Supp. 284.

²⁰ *Swart v. Borst*, 17 How. Pr. 69; *Reynolds v. Fountain*, 4 Hill, 52.

²¹ Volume 2, p. 2170.

more of them where he would be entitled to judgment if the action was against him or them alone.²² But a plaintiff cannot take judgment against a defendant "jointly" liable who is in default until the issues joined by the answer of the other defendants are disposed of.²³ A fortiori, a judgment cannot be entered against joint debtors, on the default of one, before the time for answering on the part of the other debtors has expired.²⁴ It seems that where a defendant jointly liable does not answer but his co-defendant answers, the assessment of damages should be before the same jury if the answering defendant is found to be indebted to plaintiff.²⁵

§ 2043. Death of defendant.

If defendant dies before the expiration of his time to answer, the court has no power to enter judgment against him.²⁶

§ 2044. Judgment against infant.

A judgment by default shall not be taken against an infant defendant until twenty days have expired since the appointment of a guardian ad litem for him.²⁷ This Code provision applies only in cases of default²⁸ and where the infancy is admitted.²⁹

§ 2045. Actions against corporations.

The Code provides as follows: "In an action against a foreign or domestic corporation to recover damages for the non-

²² In such a case, a severance must be ordered. Code Civ. Proc. § 456. See *Smith v. Weston*, 81 Hun, 87, 30 N. Y. Supp. 649; *Citizens' Nat. Bank v. Weston*, 81 Hun, 84, 30 N. Y. Supp. 619; *Catlin v. Billings*, 13 How. Pr. 511.

²³ *Smith v. Weston*, 81 Hun, 87, 30 N. Y. Supp. 649.

²⁴ *Jacques v. Greenwood*, 1 Abb. Pr. 230.

²⁵ *Griswold v. Stoughton*, 1 Caines, 6; *Orleans County Nat. Bank v. Spencer*, 19 Hun, 569, 574.

²⁶ *Borsdorff v. Dayton*, 17 Abb. Pr. 36, note. Effect of death in general, see vol. 2, pp. 2063-2102.

²⁷ Code Civ. Proc. § 1218.

²⁸ *Newins v. Baird*, 19 Hun, 306.

²⁹ *Jackson v. Brunor*, 16 Misc. 294, 38 N. Y. Supp. 110.

Art. I. When Allowable.—Actions Against Corporations.

payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, * * * unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.³⁰ This Code section must be strictly construed³¹ and is confined strictly to actions on instruments which admit on their face an existing debt payable absolutely,³² and hence does not apply where it is sought to charge a corporation as an indorser of a note,³³ or to an action on an insurance policy.³⁴ But it does apply to an action against a corporation on its notes, brought by an accommodation indorser who was compelled to take them up.³⁵ The provision applies to municipal corporations.³⁶ If evidence outside the instrument must be given to authorize a recovery, a default cannot be entered.³⁷ The benefit of the statute is waived by a joinder in the complaint of other causes of action not mentioned in the Code provision.³⁸

It will be noticed that the order must be served with the answer or demurrer. If an order is served no further order

³⁰ Code Civ. Proc. § 1778. This provision is constitutional. *Moran v. Long Island City*, 101 N. Y. 439.

³¹ *Bradley v. Albemarle Fertilizing Co.*, 2 Civ. Proc. R. (Browne) 50.

^{32, 33} *Shorer v. Times Printing & Pub. Co.*, 119 N. Y. 483.

³⁴ Life insurance. *New York L. Ins. Co. v. Universal L. Ins. Co.*, 88 N. Y. 424. Fire insurance. *Tyler v. Aetna F. Ins. Co.*, 2 Wend. 280.

³⁵ *Ford v. Binghamton Hydraulic Power Co.*, 54 Hun, 451, 7 N. Y. Supp. 714.

³⁶ *Moran v. Long Island City*, 101 N. Y. 439.

³⁷ *Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n*, 95 App. Div. 23, 88 N. Y. Supp. 709.

³⁸ *Bradley v. Albemarle Fertilizing Co.*, 2 Civ. Proc. R. (Browne) 50.

Art. II. Procedure.

for the trial of new issues raised by answer to an amended complaint need be served.³⁹ The granting of the order does not preclude a subsequent attack on the pleadings.⁴⁰ The refusal of the order is appealable to the appellate division.⁴¹ Before entering judgment, it is necessary to return the answer with a notice calling attention to the failure to serve said copy of order, since the retention of the answer by plaintiff prevents his taking a default judgment.⁴² No application to the court for judgment is necessary.⁴³

ART. II. PROCEDURE.

§ 2046. Entry without application to the court.

The Code provides as follows: "Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only, or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person, and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial, or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit."⁴⁴ In short, if the damages are liquidated and merely a matter of computation, the clerk may assess them. This Code provision

³⁹ *Edward Barr Co. v. Kuntz*, 18 Abb. N. C. 476.

⁴⁰ *Beaumont v. Diecks' Pharmaceutical Extract Co.*, 5 Civ. Proc. R. (Browne) 274.

⁴¹ See *Moran v. Long Island City*, 101 N. Y. 439.

⁴² *Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n*, 95 App. Div. 23, 88 N. Y. Supp. 709. Contra, *Watertown Nat. Bank v. Westchester County Water-Works Co.*, 19 Misc. 685, 44 N. Y. Supp. 1101.

⁴³ *Hutson v. Morrisania Steamboat Co.*, 12 Abb. N. C. 278, 64 How. Pr. 268.

⁴⁴ Code Civ. Proc. § 420. See, also, vol. 1, pp. 727, 728.

includes an action to recover the proportionate amount of a liquor license fee for the unexpired portion of the term for which the license was issued, since based upon an implied contract.⁴⁵ But the clerk cannot enter judgment by default without application to the court in an action to recover moneys converted by one in a fiduciary relation,⁴⁶ nor in an action against trustees of a corporation to recover for failure to file an annual report.⁴⁷

The Code provision⁴⁸ that where the right to arrest depends primarily on the nature of the action but extrinsic facts must be alleged “the plaintiff cannot recover unless he proves the same on the trial of the action” does not require such proof where judgment is taken by default so as to necessitate an application to the court.⁴⁹ Thus, in an action for conversion, where the complaint alleges that defendant admitted owing a sum therein specified and promised to pay it and that an account had been stated between the parties, judgment by default may be taken without application to the court.⁵⁰

A judgment entered upon default on a verified complaint, by the clerk, without application to the court, cannot be modified on motion.⁵¹ Furthermore, a judgment upon default entered by the clerk pursuant to the statute is deemed a judgment of the court within the rule as to presuming jurisdiction.⁵² If notice of an application for judgment is not required, and an order for judgment is made by a judge out of court, the judgment may be entered with the same force and effect as if granted in court.⁵³

⁴⁵ Augner v. New York City, 14 App. Div. 461, 43 N. Y. Supp. 803.

⁴⁶ Roeber v. Dawson, 22 Abb. N. C. 73, 21 State Rep. 160, 15 Civ. Proc. R. (Browne) 417, 3 N. Y. Supp. 160.

⁴⁷ Gadsden v. Woodward, 3 How. Pr. (N. S.) 109, 38 Hun, 548.

⁴⁸ Code Civ. Proc. § 549, subd. 2.

⁴⁹ Reeder v. Lockwood, 30 Misc. 531, 62 N. Y. Supp. 713; Steamship Richmond Hill Co. v. Seager, 31 App. Div. 288, 52 N. Y. Supp. 985. Overruling Fayerweather v. Tucker, 18 Civ. Proc. R. (Browne) 276, 11 N. Y. Supp. 39.

⁵⁰ Reeder v. Lockwood, 30 Misc. 531, 62 N. Y. Supp. 713.

⁵¹ Bullard v. Sherwood, 85 N. Y. 253.

⁵² Maples v. Mackey, 15 Hun, 533.

⁵³ Code Civ. Proc. § 1203.

Art. II. Procedure.—Entry Without Application To the Court.

—— **Notice to defendant.** Notice of the proceedings need not be given defendant unless he has appeared generally.⁵⁴ If he has appeared generally but has made default in pleading, he is entitled to at least five days' notice of the time and place of an assessment by the clerk.⁵⁵ But inasmuch as the rule is that if the complaint is verified, no assessment of damages is required, no notice is necessary in such case even if defendant has appeared,⁵⁶ unless the verification is a nullity.⁵⁷

—— **Form of notice of assessment of damages by the clerk.**

[Title of cause.]

Please take notice that the amount due the plaintiff will be assessed by the ——— clerk of ———, at his office in the city of ———, on the ——— day of ———, at ——— o'clock in the ——— noon.

[Date.]

[Signature and office address of plaintiff's attorney.]

[Address to opposing attorney.]

—— **Proof.** In such an action as mentioned above, where the summons was personally served upon the defendant, and a copy of the complaint, or a notice stating the sum of money for which judgment will be taken was served with the summons, or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice, and also proof, by affidavit, that the defendant has not appeared. Whereupon the clerk must enter final judgment in his favor.

2. If the defendant has seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons and of the appearance, or of the appearance only; and also proof, by affidavit, of the default. Whereupon the clerk must enter final judgment in his favor.⁵⁸

⁵⁴ See *Douglas v. Haberstro*, 8 Abb. N. C. 230.

⁵⁵ Code Civ. Proc. § 1219; *Kelsey v. Covert*, 15 How. Pr. 92.

⁵⁶ *Dix v. Palmer*, 5 How. Pr. 233.

⁵⁷ *Van Horne v. Montgomery*, 5 How. Pr. 238.

⁵⁸ Code Civ. Proc. § 1212.

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It will be observed that this Code section applies only where the summons was personally served or defendant has appeared generally.⁵⁹ If defendant has appeared so as to be entitled to notice of the assessment of damages, plaintiff should produce before the clerk the notice and proof of its service. Service of summons and complaint, where made at the same time, may be shown by one affidavit.

— Form of affidavit of no answer.

[Title of cause.]

[Venue.]

A. X., the attorney for plaintiff in this action, being duly sworn, says that no copy of an answer or demurrer to the complaint in this action, hereunto annexed, has been received.

[Jurat.]

[Signature.]

— Form of judgment roll.

[Title of court and cause.]

Amount claimed in,	-	-	-	-	-	-	-	-	-		
Interest,	-	-	-	-	-	-	-	-	-		
Costs by Statute,	-	-	-	-	-	\$			\$		
Additional Defendants Served with Pro-											
cess, \$2 Each,	-	-	-	-	-						
Clerk's Fee Entering Judgment,	-										
Affidavits,	-	-	-	-	-						
Transcripts and Docketing,	-	-									
Serving Complaint and Summons,	-										
Clerk's Fee Taxing Costs,	-	-									
Sheriff's Fees on Execution,	-	-									

—, being duly sworn, says that he is —, the plaintiff's attorney in the above-entitled action, that the disbursements above mentioned have been made in said action, or may be necessarily made or incurred herein, and are reasonable in amount; that the defendant has not appeared or answered or demurred herein, and his time to so do has expired and he is now in default therefor.

[Jurat.]

[Signature.]

—, 190—. The summons and complaint in this action having been personally served on —, the defendant, on the — day of

⁵⁹ Hallett v. Righters, 13 How. Pr. 43.

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——, 190—, and said defendant being now in default for his failure to appear or answer or demur herein,

Now, on motion of ——, plaintiff's attorney, it is hereby adjudged that ——, the plaintiff, recover of ——, the defendant, the sum of —— dollars, the amount claimed and interest, with —— dollars, costs, and disbursements, amounting in the whole to the sum of —— dollars (\$——).

—— **Amount of judgment and how ascertained.** Where final judgment may be entered by the clerk, the amount thereof must be determined as follows:

1. If the complaint is verified, the judgment must be entered for the sum, for which the complaint demands judgment, or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary, it may be made by the clerk.

2. If the complaint is not verified, the clerk must assess the amount due to the plaintiff by computing the sum due upon an instrument for the payment of money only, the nonpayment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action, stated in the complaint. If an instrument for the payment of money only has been lost, so that it cannot be produced to the clerk, he must take proof of its loss, and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon.⁶⁰

A default admits the allegation that a specified sum is due,⁶¹ in which respect it differs from a default in an action where application for judgment must be made to the court or a judge. The clerk has no discretion but to enter judgment for the sum and interest demanded in the complaint.

§ 2047. **Entry on application to the court where summons personally served.**

If the defendant has made default in appearing or pleading,

⁶⁰ Code Civ. Proc. § 1213.

⁶¹ Bullard v. Sherwood, 85 N. Y. 253; Darling v. Brewster, 5 T. & C. 670, 3 Hun, 219.

Art. II. Procedure.—Entry on Application To the Court.

and the case is one where the "clerk" can not enter final judgment, the plaintiff must apply to the court for judgment.⁶² In other words, in actions for unliquidated damages, an application to the court is necessary. But omission to apply to the court for leave to enter judgment is a mere irregularity which does not render the judgment void.⁶³ Special rules relating to defaults in actions to foreclose a mortgage, actions for partition, actions for a divorce, etc., will be treated of in subsequent chapters.

— **To whom and where application should be made.** The Code provides that where the summons is personally served on defendant within the state, the application for judgment may be made to the court or to a judge or justice thereof out of court, except that if one or more of the defendants have appeared, and one or more defendants have failed to appear, then the application for judgment must be made to the court, unless the defendants who have appeared consent to the making of such application to a judge or justice out of court.⁶⁴ Prior to 1900, the application could only be made to the court in any event. If the application is made to the court, the General Rules of Practice fix the procedure as follows: "When the plaintiff in an action in the supreme court is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application, except in the first judicial district, may also be made at a trial term in the county in which the action is triable. In the first judicial district, every motion or application for an order or judgment where notice is necessary, must be made to the special term for the hearing of motions, and where notice is not necessary to the special term for the transaction of ex parte business, except where other provision is expressly made by law, or the general or special

⁶² Code Civ. Proc. § 1212.

⁶³ Bissell v. New York Cent. & H. R. R. Co., 67 Barb. 385.

⁶⁴ Code Civ. Proc. § 1214.

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rules of practice. In the county of Kings all such applications shall be made at the special term for the hearing of motions. Any order or judgment granted in violation of this provision shall be vacated by the special term at which the application should have been made, or by the appellate division of the supreme court; and no order or judgment granted in violation of this rule shall be entered by the clerk.⁶⁵

— **Notice.** A defendant, if he has appeared generally but has made default in pleading, is entitled to at least eight days' notice of the time and place of an application to the court for judgment.⁶⁶ If defendant has not appeared he is not entitled to such notice. But giving five instead of eight days' notice of application for judgment does not render the judgment void.⁶⁷ So less than eight days' notice is proper where an order to show cause is made returnable in a less time.⁶⁸ The cases decided under the old Code are in conflict as to whether, in an action where an application for judgment must be made to the court, an appearance after the time for answering has expired entitles defendant to notice of the application for judgment or for the assessment of damages.⁶⁹

— **Form of notice of application.**

[Title of cause.]

Please take notice that the plaintiff will apply to the ——— court, at ———, on ———, for judgment against defendant, in the above-entitled action, for the relief demanded in the complaint.

[Date.]

[Signature and office address of plaintiff's attorney.]

[Address to defendant's attorney.]

⁶⁵ Rule 26 of General Rules of Practice. Special rules in foreclosure suits, see rule 60.

⁶⁶ Code Civ. Proc. § 1219.

⁶⁷ Union Trust Co. v. Driggs, 62 App. Div. 213, 218, 70 N. Y. Supp. 947.

⁶⁸ Citizens' Sav. Bank v. Bauer, 49 Hun, 238, 1 N. Y. Supp. 450.

⁶⁹ That it does, see *Martine v. Lowenstein*, 68 N. Y. 456; *Abbott v. Smith*, 8 How. Pr. 463; *Carpenter v. New York & N. H. R. Co.*, 11 How. Pr. 481; that it does not, see *White v. Featherstonhaugh*, 7 How. Pr. 357; *Pearl v. Robitschek*, 2 Daly, 50.

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— **Proof.** Upon the application, the plaintiff must file, if the default was in appearing, proof of service of the summons, or, if the default was in pleading, proof of appearance, and also, if a copy of the complaint was demanded, proof of service thereof, upon the defendant's attorney; and in either case, proof by affidavit, of the default which entitles him to judgment.⁷⁰

§ 2048. **Entry on application to the court where service of summons is by publication.**

Where the summons was served upon the defendant without the state, or otherwise than personally, if the defendant does not demand a copy of the complaint, or plead, as the case requires, within twenty days after the service is complete, the plaintiff may apply to the court, or a judge or justice thereof, for the judgment demanded in the complaint.⁷¹

— **Notice.** The same rule applies as where the service of summons is personal.⁷²

— **Proof.** Upon such application, he must file proof that the service is complete, and proof, by affidavit, of the defendant's default.⁷³ The court, or a judge or justice thereof, must require proof of the cause of action set forth in the complaint to be made, either before such court, or such judge or justice, or before a referee appointed for that purpose; except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of inquiry as prescribed in section 1215 of the Code.⁷⁴ It will be noticed that the Code does not specify the nature of the proof of the cause of action.⁷⁵

Where the defendant is a nonresident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

⁷⁰ Code Civ. Proc. § 1214.

⁷¹ Code Civ. Proc. § 1216.

⁷² See ante, § 2047.

⁷³, ⁷⁴ Code Civ. Proc. § 1216.

⁷⁵ *Stow v. Stacy*, 14 Civ. Proc. R. (Browne) 45.

Art. II. Procedure.—Entry on Application.—Service By Publication.

1. Proof, by affidavit, that a warrant of attachment, granted in the action, has been levied upon property of the defendant.

2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof, according to the inventory.

3. The undertaking mentioned in section 1216 of the Code, if one has been required.⁷⁶

Proof of the levy of the attachment is jurisdictional but affidavits thereto may be contradicted.⁷⁷

—**Examination of plaintiff as to payments.** If the defendant is a “nonresident or a foreign corporation,” the court, or a judge or justice to whom such application is made, must require the plaintiff, or his agent or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment to which the plaintiff is entitled.⁷⁸

—**Requiring plaintiff to file undertaking.** Before rendering judgment, the court, or a judge or justice thereof, to whom the application is made, may, in any case, in its or their, discretion, require the plaintiff to file an undertaking to abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action and succeeds in his defense.⁷⁹

—**Judgment.** A judgment shall not be rendered for a sum of money only, except in an action to recover a sum of money only as damages (1) for breach of contract, express or implied, other than a contract to marry, or (2) for wrongful conversion of personal property, or (3) for an injury to person⁸⁰ or property, in consequence of negligence, fraud, or other wrongful act.⁸¹

⁷⁶ Code Civ. Proc. § 1217.

⁷⁷ *Capital City Bank v. Parent*, 134 N. Y. 527, 530.

⁷⁸, ⁷⁹ Code Civ. Proc. § 1216.

⁸⁰ Libel is an injury to the person. *Davis v. Fox*, 1 App. Div. 403, 37 N. Y. Supp. 163.

⁸¹ Code Civ. Proc. § 1217, in connection with § 635.

§ 2049. Withdrawal of application for judgment.

Where an application is made to the court for judgment, it cannot be withdrawn without the express permission of the court.⁸²

§ 2050. Second application to another judge.

Where an application is made to the court for judgment, a subsequent application for judgment shall not be made at a term held by another judge, except where the first application is withdrawn by the express permission of the court, or where the directions given thereupon require an act to be done before judgment can be rendered, or where the fact of the former application is stated, and the proceedings thereupon, and subsequent thereto, are fully set forth, in the papers upon which the application is made.⁸³

§ 2051. Matters admitted by default.

The default admits that a cause of action exists but not that plaintiff is entitled to the precise relief demanded⁸⁴ nor the existence of facts alleged extrinsic to the cause of action.⁸⁵ A default admits only the facts pleaded and not the legal conclusions as to liability or the extent of liability.⁸⁶ Defendant admits simply that plaintiff is entitled to the relief which the facts properly alleged entitle him to,⁸⁷ i. e., he concedes the right to damages but not the amount thereof.⁸⁸ Plaintiff is entitled to nominal damages though he introduces no evidence, but proof of special damages must be made. In ejectment, a default admits the facts alleged in the complaint so that plaintiff is entitled to judgment without proof of such facts.⁸⁹

⁸², ⁸³ Code Civ. Proc. § 777.

⁸⁴ *United States L. Ins. Co. v. Jordan*, 46 Hun, 201.

⁸⁵ *Stelle v. Palmer*, 11 Abb. Pr. 62.

⁸⁶ *Bullard v. Sherwood*, 85 N. Y. 253.

⁸⁷ *Argall v. Pitts*, 78 N. Y. 239.

⁸⁸ *Bassett v. French*, 10 Misc. 672, 31 N. Y. Supp. 667.

⁸⁹ *Sayres v. Miller*, 10 Civ. Proc. R. (Browne) 69.

§ 2052. Ascertaining amount of damages.

Defendant having defaulted in an action where the damages are unliquidated so that an application to the court or to a justice for judgment is necessary, the question arises as to how far proof of the cause of action is necessary and the manner in which and before whom such proof shall be taken.⁹⁰

— **Mode.** The court, or a judge or justice thereof, may, without a jury, or with a jury if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it, or them, to render the judgment, or to carry it into effect; or it, or they, may in its, or their, discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry.⁹¹

— **Review.** The method of review is by a motion to set aside the inquisition. The order is appealable to the appellate division but is not reviewable in the court of appeals.⁹²

§ 2053. Reference and writ of inquiry.

Inasmuch as many of the rules applicable to a writ of inquiry also apply to a reference, these two modes of ascertaining the damages will be considered together. The general rules relating to references to report on the facts, as set forth in a preceding chapter,⁹³ apply to the reference except as herein specially provided for and hence the procedure on the reference will not be reiterated.

A writ of inquiry is proper, in the discretion of the court or judge, in any case where application must be made to the court for judgment as by default, and it is the only mode of procedure where the action is to recover damages for a per-

⁹⁰ See ante, § 2048, as to procedure where service of summons is not personal.

⁹¹ Code Civ. Proc. § 1215.

⁹² *Bassett v. French*, 155 N. Y. 46.

⁹³ Ante, §§ 1938-1943.

Art. II. Procedure.—Reference and Writ of Inquiry.

sonal injury or an injury to property.⁹⁴ It was formerly held that a writ of inquiry was improper in an equity suit.⁹⁵

—**The writ.** A writ of inquiry is directed to the sheriff “because it is unknown what damages the plaintiff hath sustained,” commanding the sheriff to inquire into such damages by a jury impaneled therefor and to return the inquisition to the court. The Code rules relating to writs in general apply to the form of the writ.⁹⁶ It is not fatal that the writ errs in describing the court.⁹⁷

—**Where executed.** A reference or writ of inquiry shall be executed in the county in which the action is triable, unless the court shall otherwise order.⁹⁸

—**Notice.** In a case where an application for judgment must be made to the court, the defendant may serve upon the plaintiff’s attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature his office address, with the particulars, prescribed in section four hundred and seventeen of the Code, concerning the office address of the plaintiff’s attorney. Thereupon at least five days’ notice of the time and place of the execution of the reference, or writ of inquiry, must be given to the defendant, by service thereof upon the person, whose name is subscribed to the demand, in the manner prescribed for service of a paper upon an attorney in an action.⁹⁹

⁹⁴ Code Civ. Proc. §§ 1215, 1216; *Thompson v. Finn*, 11 Wkly. Dig. 182.

⁹⁵ *Kreitz v. Frost*, 55 Barb. 474.

⁹⁶ Volume 1, p. 225.

⁹⁷ *Richardson v. Backus*, 1 Johns. 59.

⁹⁸ Rule 26 of General Rules of Practice.

⁹⁹ Code Civ. Proc. § 1219; *Potter v. Davison*, 8 Abb. Pr. 43. Notice of trial correct as to date but incorrect as to day is good. *Wolfe v. Horton*, 3 Caines, 86. Inquest will not be opened because of defective notice of trial where party was not misled. *New York Cent. Ins. Co. v. Kelsey*, 13 How. Pr. 535.

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Demanding notice of the execution of any reference or writ of inquiry is not a general appearance but merely entitles defendant to five days' notice of the time and place of the execution of the reference or writ of inquiry.¹⁰⁰

— Form of demand.

[Title of cause.]

—, the defendant in the above-entitled action, hereby demands notice of the execution of any reference or writ of inquiry which may be granted on plaintiff's application for judgment in this action.

[Date.]

[Signature, etc., of defendant's attorney.]

[Address to plaintiff's attorney.]

— **Mode of executing writ.** The Code does not prescribe the mode of executing the writ and the practice has not met with much consideration from the courts especially in recent years. The precise manner in which the damages are to be assessed or how the jury are to be impaneled is not defined.¹⁰¹ If it is probable that complicated questions of law will arise, it is proper to order the writ of inquiry to be executed before the court at a trial term instead of before a sheriff.¹⁰² In such a case, the judge is not the mere assistant of the sheriff but controls the inquiry.¹⁰³ In an action for personal injuries, where defendant makes default, the court may order that the sheriff attend and execute the writ of inquiry in open court with the judge presiding, and that the jury be drawn from the panel of jurors then in attendance at a regular trial term.¹⁰⁴ The writ may be executed by a deputy or under sheriff unless the writ itself requires the sheriff to attend in person.¹⁰⁵ If a juror is objected to, another should be summoned in his place.¹⁰⁶ Objections to jurors must, however, be made open-

¹⁰⁰ *Arkenburgh v. Arkenburgh*, 14 App. Div. 367, 43 N. Y. Supp. 892.

¹⁰¹ *Elsey v. International R. Co.*, 93 App. Div. 115, 87 N. Y. Supp. 28.

¹⁰² *Cazneau v. Bryant*, 13 Super. Ct. (6 Duer) 668; *Joannes v. Fisk*, 26 Super. Ct. (3 Rob.) 710; *Dillaye v. Hart*, 8 Abb. Pr. 394.

¹⁰³ *Ellsworth v. Thompson*, 13 Wend. 658.

¹⁰⁴ *Elsey v. International R. Co.*, 93 App. Div. 115, 87 N. Y. Supp. 28.

¹⁰⁵ *Tillotson v. Cheetham*, 2 Johns. 63.

¹⁰⁶ *Ellsworth v. Thompson*, 13 Wend. 658.

ly.¹⁰⁷ Both parties may subpoena witnesses who are sworn by the sheriff where the writ is executed before him and by the clerk of the court where the writ is executed at trial term. Defendant may cross-examine, object to evidence, and except,¹⁰⁸ but cannot give evidence tending to disprove the cause of action,¹⁰⁹ though he may give evidence in mitigation of damages.¹¹⁰ Defendant may show the value of the property converted.¹¹¹ Defendant may object to the jurisdiction of the court and to the sufficiency of the complaint to constitute a cause of action.¹¹² If there is a counterclaim but no reply, plaintiff, on taking an inquest, must deduct the amount of the counterclaim.¹¹³ The sheriff should not allow the testimony to be taken in other cases before submitting one to the jury.¹¹⁴ The sheriff may adjourn the execution of the writ.¹¹⁵

— **Inquisition.** The inquisition is signed by the sheriff and jury where executed by the sheriff but the jury need not sign it where executed at the trial term.

— **Form of writ and inquisition.**

The People of the State of New York,

To the sheriff of the county of ———, Greeting:

Whereas, in an action brought by ——— against ——— in the ———

¹⁰⁷ *Butler v. Kelsey*, 15 Johns. 177.

¹⁰⁸ *Green v. Willis*, 1 Wend. 78.

¹⁰⁹ *Foster v. Smith*, 10 Wend. 377.

¹¹⁰ *Saltus v. Kipp*, 12 Super. Ct. (5 Duer) 646, 2 Abb. Pr. 382; *Gilbert v. Rounds*, 14 How. Pr. 46. But such evidence cannot be given where its direct effect is to show that no cause of action exists. *Thompson v. Lumley*, 7 Daly, 74, 50 How. Pr. 165.

¹¹¹ *Duffus v. Bangs*, 61 Hun, 23, 15 N. Y. Supp. 444.

¹¹² *Pumpelly v. Village of Owego*, 45 How. Pr. 219.

¹¹³ *Potter v. Smith*, 9 How. Pr. 262.

¹¹⁴ *Samuels v. Bryant*, 4 Alb. Law J. 367; *Van Waggenen v. McDonald*, 3 Wend. 478.

¹¹⁵ *Eastgate v. Hunt*, 3 N. Y. Leg. Obs. 77. The fact that defendant cannot be present at the assessment of damages by a sheriff's jury is no reason for postponing it, unless it also appears that if he were present he could give evidence tending to lessen the verdict, and that the facts which it is proposed to prove by him are denied by plaintiffs. *Samuels v. Bryant*, 14 Abb. Pr. (N. S.) 442.

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court such proceedings were had, upon the due personal service of the summons and complaint therein upon said ——— that the said ——— obtained an order of the said court, directing the plaintiff's damages in the said action to be assessed by a jury, a copy of the complaint in said action being hereunto annexed:

Therefore we command you that by the oaths of twelve good and lawful men of your county, you diligently inquire what damages the said ——— hath sustained for and on account of the matters alleged in said complaint, and that you with all convenient speed return to the office of the clerk of ——— the inquisition taken by you, by virtue of this writ, under your seal and the seals of those by whose oaths you shall take that inquisition, together with this writ,

Witness, ——— Esq. ——— at the ——— the ——— day of ———, 19—

[Signature and office address of attorney.]

[Signature of clerk.]

[Vener.]

Inquisition, taken the ——— day of ——— in the year ———, before me, ——— sheriff of the county of ———, at ———, in the said ———, by virtue of a certain writ of inquiry of damages to me directed, and to this inquisition annexed, to inquire of and concerning certain matters in the said writ contained, specified by the oaths of [here name the jurors], twelve good and lawful men of the said ——— county, who being chosen, tried and sworn, say upon their oaths, that the plaintiff, ———, in the said writ named, has sustained damages by reason of the matter in the said writ contained, to the amount of ——— dollars, besides the costs and charges by the said ———, about this suit in that behalf expended, and for those costs and charges to the amount of ———.

In witness whereof, as well I, the said sheriff, as the jurors aforesaid, to this inquisition have set our hands and seals, the day and year above written.

Jurors.

[Signature and seal of sheriff.]

[Signature of each juror.]

— Form of return to be endorsed on writ.

The execution of the within writ appears by the inquisition hereto annexed.

[Date.]

[Signature].

Sheriff.

— Subsequent procedure. Where a reference or writ of inquiry is directed, the court, or a judge or justice thereof, may direct that the report or inquisition be returned to the

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court, or a judge or justice thereof, for its, or their, further action; or it, or they, may, in its, or their, discretion, except where special provision is otherwise made by law, omit that direction; in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages ascertained by the inquisition, without any further application.¹¹⁶

—**New hearing or new writ.** Where a reference, or a writ of inquiry, directed as prescribed in section 1015, or section 1215 of the Code, has been executed, “either party may apply for an order, directing a new hearing, or a new writ of inquiry, upon proof by affidavit, that error was committed, to his prejudice, upon the hearing, or in the report, or upon the execution of the writ, or in the inquisition.”¹¹⁷ It seems that this method of review is the only way in which the assessment of damages can be reviewed.¹¹⁸ A motion to set aside the writ cannot be made until the writ is before the court,¹¹⁹ but, in a proper case, the application may be granted, after judgment has been entered, in which case the judgment may be set aside, either then or after the new hearing, or the execution of the new writ, as justice requires.¹²⁰ Delay in moving may be fatal.¹²¹ The affidavit to move to set aside an inquest must state that an inquest was taken by default; the clerk’s certificate cannot be received unless a copy has been served.¹²² The motion must be made at special term, and the proof must be by affidavit.

¹¹⁶ Code Civ. Proc. § 1215; *Elsev v. International R. Co.*, 93 App. Div. 115, 87 N. Y. Supp. 28.

¹¹⁷ Code Civ. Proc. § 1232. Grounds for setting aside report of referee, see ante, § 1902.

¹¹⁸ See *Bossout v. Rome, W. & O. R. Co.*, 131 N. Y. 37.

¹¹⁹ *Abeel v. Wolcott*, 1 Caines, 250.

¹²⁰ Code Civ. Proc. § 1232.

¹²¹ Application to set aside irregular inquest not to be granted, if made later than the next term. *McEvers v. Markler*, 1 Johns. Cas. 248, *Colem. & C. Cas.* 96. So of seven years. *Thorp v. Fowler*, 5 Cow. 446. Delay of two years held fatal. *Hendricks v. Carpenter*, 1 Abb. Pr. (N. S.) 213, 25 Super. Ct. (2 Rob.) 625.

¹²² *Fink v. Bryden*, 3 Johns. 244.

The inquest may be set aside because of the admission of improper evidence,¹²³ or because a bystander was allowed to mix and converse with the jury.¹²⁴ But not because of the insufficiency of the evidence,¹²⁵ nor to enable a party to produce a material witness where it is shown that the party was guilty of gross laches in his effort to procure the attendance of such witness;¹²⁶ nor because of the excess of parties, a variance or the improper allowance of an amendment;¹²⁷ nor because of irregularity in summoning the jurors, the reading of the complaint in evidence, or excessiveness of damages where the evidence is not disclosed on the motion.¹²⁸ Furthermore, the inquest should not be set aside where defendant's answer is bad,¹²⁹ nor where the court is not fully satisfied that the defendant has evidence which will materially reduce the recovery.¹³⁰

Where an assessment of damages by a sheriff's jury has been set aside for irregularity, it is not proper that the second assessment should be made by the same jury which made the first assessment.¹³¹

§ 2054. Assessment after remittitur from court of appeals.

Section 194 of the Code provides as follows: "Upon an appeal from an order granting a new trial, on a case or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, an assessment of

¹²³ But only where injustice has been done. *Ward v. Haight*, 3 Johns. Cas. 80; *Mankleton v. Lilly*, 3 State Rep. 421, 25 Wkly. Dig. 354.

¹²⁴ *Woods v. Hart*, *Colem. & C. Cas.* 447.

¹²⁵ *Greenleaf v. Brooklyn, F. & C. F. R. Co.*, 102 N. Y. 96.

¹²⁶ *O'Meara v. Interurban St. R. Co.*, 87 N. Y. Supp. 405.

¹²⁷ *Burger v. Baker*, 4 Abb. Pr. 11.

¹²⁸ *Jennings v. Astin*, 12 Super. Ct. (5 Duer) 695, 3 Abb. Pr. 373.

¹²⁹ *Hunt v. Mails*, 1 Code R. 118.

¹³⁰ *Leighton v. Wood*, 17 Abb. Pr. 177; *Code Civ. Proc.* § 1232.

¹³¹ It seems, however, that a new panel need not be drawn. *Samuels v. Bryant*, 14 Abb. Pr. (N. S.) 442.

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damages, or any other proceeding, requisite to render the judgment effectual, may be had in the latter court." The practice in a proceeding to assess damages in such cases is not specially laid down in the Code.¹³² The assessment must be in the court of original jurisdiction which proceeds in a manner similar to the taking of an ordinary inquest. There is nothing which compels its execution at a trial term, though it is better to so execute it as a jury is there already provided. The assessment cannot be reviewed by a motion for a new trial but the proper practice is to move to set aside the assessment. The order granted thereon is appealable, it seems, to the appellate division but no further appeal can be taken to the court of appeals. Furthermore, the judgment entered on the assessment is not reviewable on appeal on legal grounds.¹³³ The motion may be made at the trial term,¹³⁴ and the usual practice is to make the motion on the rendering of the verdict on the minutes of the court and then, if an appeal is desired, to make and settle a case and exceptions.¹³⁵ The appellate division may direct a new assessment without permitting plaintiff to accept a reduced verdict.¹³⁶ An assessment of damages is not necessary where the trial court has found the amount thereof by a reference previous to the appeal.¹³⁷

ART. III. OPENING.

§ 2055. General considerations.

The question of when a judgment will be vacated and the procedure thereon have been already considered and the rules hitherto laid down apply to the vacation of judgments by default. It has been deemed advisable, however, to separately consider rules particularly relating to the opening of judg-

¹³² *Yaw v. Whitmore*, 66 App. Div. 317, 72 N. Y. Supp. 765.

¹³³ *Bossout v. Rome, W. & O. R. Co.*, 131 N. Y. 37.

¹³⁴, ¹³⁵ *Yaw v. Whitmore*, 66 App. Div. 317, 72 N. Y. Supp. 765.

¹³⁶ *Lewin v. Lehigh Valley R. Co.*, 66 App. Div. 409, 414, 72 N. Y. Supp. 881.

¹³⁷ *Wright v. City of Mt. Vernon*, 78 App. Div. 467, 79 N. Y. Supp. 894.

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ments by default.¹³⁸ The opening of a default judgment is not identical with its reversal or vacation but is merely a mode of allowing the defendant a hearing on the merits, since the judgment may still stand as a security for the fulfillment of the terms imposed on the applicant.¹³⁹ The giving leave by the appellate division, upon payment of costs, to apply to the court below to open a default, is not to be taken as an intimation that the default ought to be opened.¹⁴⁰

§ 2056. Jurisdiction.

The fact that a county court has acquired jurisdiction of the person and property of a lunatic does not, in the absence of laches, oust the supreme court of jurisdiction to open his default.¹⁴¹

§ 2057. Grounds.

Section 724 of the Code which authorizes the opening of a judgment taken through "mistake, inadvertence, surprise, or excusable neglect" of the party against whom judgment is entered has already been considered,¹⁴² but the power to open a default judgment is not limited by such Code section.¹⁴³

— **Absence of party.** The absence of a party, as where he is in prison,¹⁴⁴ is ground for opening.

— **Illness of party.** The illness of defendant, under special circumstances, may constitute ground for opening a default.¹⁴⁵

¹³⁸ Right of defendant who has not appeared to defend after judgment where service is by publication, see vol. 1, p. 781.

¹³⁹ See 6 Enc. Pl. & Pr. 151, note; *Appel v. Brooks*, 54 State Rep. 63, 24 N. Y. Supp. 100; *Abram French Co. v. Marx*, 8 Misc. 490, 28 N. Y. Supp. 749.

¹⁴⁰ *Csatlos v. Metropolitan St. R. Co.*, 67 App. Div. 459, 73 N. Y. Supp. 951.

¹⁴¹ *Kent v. West*, 22 Misc. 403, 50 N. Y. Supp. 339.

¹⁴² See ante, p. 2820.

¹⁴³ See ante, § 2022, last paragraph. There must, however, be some ground for equitable interference. *Ingalls v. Merchants' Nat. Bank*, 51 App. Div. 305, 64 N. Y. Supp. 911.

¹⁴⁴ *Bonnell v. Rome, W. & O. R. Co.*, 12 Hun, 218.

¹⁴⁵ *Carey v. Browne*, 67 Hun, 516, 22 N. Y. Supp. 521.

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—**Infancy of defendant.** A judgment taken by default will not be vacated on the ground that the defendant was not of age at the time of said judgment and that, therefore, it is void, but the proper remedy is a motion to open the default and allow the defendant to come in and defend.¹⁴⁶

—**Absence of defendant's attorney.** Judgment may be opened where defendant's attorney has failed to appear,¹⁴⁷ as where he was engaged in another court,¹⁴⁸ or was sick.¹⁴⁹ But a refusal to open a default judgment, where no reason is given for the absence of defendant's attorney, will not be disturbed.¹⁵⁰

—**Ignorance or incompetency of counsel.** Ignorance, incompetency, or negligence of counsel is ground for opening a default.¹⁵¹

—**Fraud.** Fraud and collusion in obtaining the judgment is ground for opening.¹⁵²

—**Discharge in bankruptcy.** A default may be opened on terms where defendant has been discharged in bankruptcy after answer and before the rendition of judgment, to enable defendant to put in a supplemental answer setting up the discharge.¹⁵³

—**Mistake of clerk in entering judgment.** It seems that if interest is illegally charged in a judgment by default entered upon a verified complaint by the clerk without application to the court, defendant's remedy is by a motion to exense the default and for leave to defend, which if granted, will enable him to offer to allow judgment for the amount conceded to be due, and defend as to the rest.¹⁵⁴

¹⁴⁶ Appel v. Brooks, 54 State Rep. 63, 24 N. Y. Supp. 100.

¹⁴⁷ Atkinson v. Abraham, 78 App. Div. 498, 79 N. Y. Supp. 680.

¹⁴⁸ Fowler v. Hay, 1 How. Pr. 40. See, also, Kitson v. Blake, 39 State Rep. 45, 14 N. Y. Supp. 446.

¹⁴⁹ Sheridan v. Kelly, 2 How. Pr. 28.

¹⁵⁰ Greenberg v. Angerman, 84 N. Y. Supp. 244.

¹⁵¹ Gideon v. Dwyer, 17 Misc. 233, 40 N. Y. Supp. 1053; Berkeley v. Kennedy, 65 App. Div. 613, 72 N. Y. Supp. 734. See, also, Simon v. Borden's Condensed Milk Co., 84 N. Y. Supp. 476.

¹⁵² Hartigan v. Nagle, 11 Misc. 449, 32 N. Y. Supp. 220.

¹⁵³ Kahn & Co. v. Casper, 51 App. Div. 540, 64 N. Y. Supp. 838.

¹⁵⁴ Bullard v. Sherwood, 85 N. Y. 253.

— **Greater relief than demanded.** A default judgment giving greater relief than that demanded should be set aside.¹⁵⁵ And it seems that the same rule applies although the prayer for relief has been amended unless notice of such amendment has been given to defendant.¹⁵⁶

§ 2058. Grounds for refusing.

A motion to open a default should not be granted where leave so to do was granted but the court refused to set aside the judgment whereupon defendant appealed, several years having elapsed and plaintiff having died in the meantime.¹⁵⁷ So where the party has deceived the court, it may refuse to open his default.¹⁵⁸ And a default will not be opened merely to permit evidence in mitigation of damages.¹⁵⁹ But payment of a judgment taken by default is not a bar to a motion to open the default.¹⁶⁰ The denial of a motion to set aside an inquest does not bar a motion to vacate the judgment entered thereon.¹⁶¹

The old rule was that a default would not be opened to let in a so-called unconscionable defense such as usury or the statute of limitations,¹⁶² but such defenses are not now discriminated against.¹⁶³

§ 2059. Effect of stipulations and agreements.

The right to take a default may be affected by stipulation. A stipulation not reduced to writing may be set up to excuse

¹⁵⁵ *Andrews v. Monilaws*, 8 Hun, 65. So such a judgment may be collaterally attacked. *Clapp v. McCabe*, 155 N. Y. 525.

¹⁵⁶ *Cassidy v. Boyland*, 15 Civ. Proc. R. (Browne) 320. Such a judgment is voidable but not void. *Carr v. Sterling*, 114 N. Y. 558.

¹⁵⁷ *Wight v. Bennett*, 30 State Rep. 161, 8 N. Y. Supp. 808.

¹⁵⁸ *Ransdell v. National R. & N. Co.*, 29 App. Div. 388, 46 N. Y. Supp. 519.

¹⁵⁹ *Hays v. Berryman*, 19 Super. Ct. (6 Bosw.) 679.

¹⁶⁰ *Arnold v. Norfolk & N. B. Hosiery Co.*, 47 State Rep. 362, 47 N. Y. Supp. 957.

¹⁶¹ *Reidy v. Bleistift*, 31 Misc. 181, 63 N. Y. Supp. 974.

¹⁶² *Beach v. Fulton Bank*, 3 Wend. 573.

¹⁶³ *Benedict v. Arnoux*, 85 Hun, 283, 32 N. Y. Supp. 905.

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a default but not to impeach its regularity.¹⁶⁴ The fact that an inquest was taken after an appointment of a meeting to compromise is a sufficient excuse.¹⁶⁵ But negotiations for a settlement, without an express agreement to suspend proceedings, will not excuse a regular default.¹⁶⁶

§ 2060. Who may move.

A judgment entered by default against a defendant after service of the summons upon another person having a somewhat similar name will not be set aside upon motion of the latter, as such judgment cannot be enforced against him and he cannot force himself into the record; although it seems that the defendant might move to set aside the judgment on the ground that he had not been served with process.¹⁶⁷ So a default judgment entered against "Zachariah" B., the name Zachariah having been alleged by plaintiff to be fictitious and defendant's Christian name unknown, will not be vacated on motion of "Zax" B., for failure to serve summons, no effort having been made to enforce it against Zax.¹⁶⁸ But an intended defendant against whom a judgment was taken on an answer by a stranger may come in and have it set aside on motion.¹⁶⁹ The personal representatives of a deceased defendant against whom judgment was taken by default in his lifetime may not move to open such default until they have become parties to the action.¹⁷⁰

§ 2061. Time for motion.

The lapse of a year does not necessarily preclude the right

¹⁶⁴ *Wager v. Stickle*, 3 Paige, 407.

¹⁶⁵ *Brevort v. Sayre*, *Colem. & C. Cas.* 419.

¹⁶⁶ *Norton v. Kosboth*, *Hopk. Ch.* 101.

¹⁶⁷ *Upham v. Cohn*, 14 *Civ. Proc. R. (Browne)* 27.

¹⁶⁸ *Meurer v. Berlin*, 80 *App. Div.* 294, 80 *N. Y. Supp.* 240.

¹⁶⁹ *Smith v. Jackson*, 20 *Abb. N. C.* 422, 12 *Civ. Proc. R. (Browne)* 428.

¹⁷⁰ *Philipe v. Levy*, 15 *Civ. Proc. R. (Browne)* 68, 16 *State Rep.* 889, 3 *N. Y. Supp.* 664.

to move,¹⁷¹ but the motion may be denied for laches.¹⁷² Waiting, after notice of assessment, till judgment entered on an irregular default, before moving against the default, is a waiver of the irregularity.¹⁷³

§ 2062. Notice of motion.

Notice of the motion should be given the judgment creditor or his successor or representative. If the judgment has been assigned, notice should be given to the assignee.¹⁷⁴ If based on an irregularity, then, of course, the notice must specify such irregularity. But entering judgment by default after service of an answer is not a mere irregularity within the rule requiring an irregularity complained of to be specified.¹⁷⁵ If there is no hearing on the merits no greater relief can be granted than that sought in the notice of motion.¹⁷⁶

§ 2063. Motion papers.

The motion must be based on an affidavit which must state that a default has been taken,¹⁷⁷ and set forth the excuses for not pleading.¹⁷⁸ A meritorious defense must also be disclosed.¹⁷⁹

¹⁷¹ *Kiefer v. Grand Trunk R. Co.*, 28 State Rep. 474, 8 N. Y. Supp. 230; *Dinsmore v. Adams*, 49 How. Pr. 238, 5 Hun, 149.

¹⁷² Eighteen months. *Wygant v. Brown*, 27 State Rep. 4, 7 N. Y. Supp. 490. Six years. *Drummond v. Matthews*, 42 State Rep. 117, 17 N. Y. Supp. 726; *Tooker v. Booth*, 7 Misc. 421, 27 N. Y. Supp. 974. Fourteen years. *Wade v. De Loyer*, 40 Super. Ct. (8 J. & S.) 541. Laches held not ground for refusing in *Lorzing v. Eisenberg*, 5 Misc. 358, 25 N. Y. Supp. 750; *Arnold v. Norfolk & N. B. Hosiery Co.*, 47 State Rep. 362, 19 N. Y. Supp. 957.

¹⁷³ *Gallagher v. White*, 5 N. Y. Leg. Obs. 100.

¹⁷⁴ *Robinson v. American Chemical Co.*, 9 Civ. Proc. R. (Browne) 78.

¹⁷⁵ *Decker v. Kitchen*, 21 Hun, 332.

¹⁷⁶ *Headdings v. Gavette*, 86 App. Div. 592, 83 N. Y. Supp. 1017.

¹⁷⁷ *Pike v. Power*, 1 How. Pr. 53.

¹⁷⁸ *McKinstry v. Edwards*, 2 Johns. Cas. 113; *Johnson v. Clark*, 6 Wend. 517.

¹⁷⁹ *Cooper v. Findley*, 53 Super. Ct. (21 J. & S.) 524; *Randall v. United L. & A. Ins. Ass'n*, 39 State Rep. 155, 14 N. Y. Supp. 631; *Devlin v. Boyd*, 69 Hun, 328, 23 N. Y. Supp. 523.

— **Affidavit of merits.** In all cases where the application to vacate a judgment is not based on want of jurisdiction or irregularity but upon something presented as an “excuse” by the defendant, he must make an affidavit of merits.¹⁸⁰ Failure to serve an affidavit of merits is not fatal, however, where the summons was accompanied by a notice that on default a money judgment for a specified sum would be taken and judgment is entered against defendant on a complaint charging fraud and he is subsequently arrested on a body execution, especially where defendant concedes the debt to be due and unpaid.¹⁸¹ In short, an affidavit of merits is not required where the court has no discretion but must vacate the judgment as a matter of right.¹⁸² The affidavit of merits cannot be controverted¹⁸³ in so far as the merits are concerned.¹⁸⁴

— **Copy of proposed answer.** The papers must contain a copy of the proposed answer.¹⁸⁵

¹⁸⁰ 1 Black, Judg. 423; *Stewart v. McMartin*, 2 How. Pr. 38; *Popkin v. Friedlander*, 23 Misc. 475, 51 N. Y. Supp. 398; *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80; *Gold v. Hutchinson*, 26 Misc. 1, 55 N. Y. Supp. 575. Contents of affidavit of merits, see vol. 1, p. 561.

¹⁸¹ *Morris v. Kahn*, 31 Misc. 25, 62 N. Y. Supp. 1040.

¹⁸² *American Audit Co. v. Industrial Federation*, 84 App. Div. 304, 82 N. Y. Supp. 642.

¹⁸³ *Hanford v. McNair*, 2 Wend. 286; *Gideon v. Dwyer*, 17 Misc. 233, 40 N. Y. Supp. 1053.

¹⁸⁴ The rule that counter affidavits of want of merits cannot be admitted to disprove an affidavit of merits is confined to the point of controverting the merits. Where excuse is alleged for presenting an affidavit made by attorney or agent, plaintiff may present affidavits to show that the excuse is false or frivolous. *Johnson v. Lynch*, 15 How. Pr. 199.

¹⁸⁵ *Maguire v. Maguire*, 75 App. Div. 534, 78 N. Y. Supp. 312; *Allen v. Fowler & Wells Co.*, 45 App. Div. 506, 61 N. Y. Supp. 325; *Richardson v. Sun Printing & Pub. Ass'n*, 20 App. Div. 329, 46 N. Y. Supp. 814; *Powers v. Trenor*, 3 Hun, 3, 5 T. & C. 231; *Weston v. McCormick*, 3 Month. Law Bul. 11; *Sutherland v. Mead*, 80 App. Div. 103, 80 N. Y. Supp. 505; *Schumpp v. Interurban St. R. Co.*, 81 App. Div. 576, 81 N. Y. Supp. 366. This rule applies equally well where the moving party is the city of New York. *Meyer v. City of New York*, 80 App. Div. 584, 80 N. Y. Supp. 774. That it is not necessary in certain cases, see *Carey v. Browne*, 67 Hun, 516, 22 N. Y. Supp. 521.

§ 2064. **Hearing.**

Where the averments of the proposed answer show a case entitling the moving defendant to relief, and there is no imputation upon the good faith of the application, the court will not consider or pass upon the weight of the proof.¹⁸⁶ So the question whether the complaint states a cause of action will not be considered.¹⁸⁷

— **Reference.** A reference to take proof is often ordered where the affidavits are conflicting.¹⁸⁸

— **Burden of proof.** The burden of establishing good faith is on the moving party.¹⁸⁹

— **Discretion of court.** The opening a default is a matter of favor and not of right,¹⁹⁰ but it is almost a matter of course on defendant swearing to merits and paying costs.¹⁹¹ The discretion will not ordinarily be interfered with on appeal except in case of clear abuse.¹⁹²

§ 2065. **Imposing terms.**

The order may impose terms,¹⁹³ which terms are in the discretion of the court.¹⁹⁴ Although it is usual, in setting aside a regular judgment, to condition the order upon payment of the costs incurred in entering the judgment, yet where a judgment was obtained by default in consequence of a misapprehension of the defendant's attorney, and on the defendant's motion to vacate it his affidavits that there was no cause of

¹⁸⁶ *King v. Sullivan*, 31 App. Div. 549, 52 N. Y. Supp. 130.

¹⁸⁷ *Croden v. Drew*, 10 Super. Ct. (3 Duer) 652.

¹⁸⁸ *Kinney v. Meyer*, 32 State Rep. 545, 10 N. Y. Supp. 448; *Dovale v. Ackerman*, 27 State Rep. 895, 7 N. Y. Supp. 833.

¹⁸⁹ Affidavit of merits is not of itself sufficient. *Deane v. Loucks*, 58 Hun, 555, 12 N. Y. Supp. 903.

¹⁹⁰ *Henry Huber Co. v. Soles*, 12 Misc. 548, 34 N. Y. Supp. 17.

¹⁹¹ *Quinn v. Case*, 2 Hilt. 467; *Commissioners of Excise v. Hollister*, 2 Hilt. 588.

¹⁹² See *O'Meara v. Interurban St. R. Co.*, 87 N. Y. Supp. 405.

¹⁹³ *Gerard v. Gerard*, 2 Barb. Ch. 73.

¹⁹⁴ *Jackson v. Brunor*, 16 Misc. 294, 38 N. Y. Supp. 110; *Flannery v. James*, 18 Wkly. Dig. 557.

action were not denied by the plaintiff, the judgment was vacated, with costs of motion.¹⁹⁵ Costs should not be directed to abide the event.¹⁹⁶ Besides the payment of costs it has been held proper to require an immediate reference and a speedy trial,¹⁹⁷ or a stipulation that in case of the death of plaintiff his testimony taken on the inquest be read on the trial;¹⁹⁸ but requiring a trial on a printed case,¹⁹⁹ or a waiver of the right to appeal,²⁰⁰ or a stipulation to stay the proceedings on a judgment recovered by defendant against plaintiff,²⁰¹ have been held improper. So the interposing of specified defenses should not be barred.²⁰² But security for costs may be required in a case where security may be ordered.²⁰³

Defendant may refuse to accept the order, and allow the judgment to stand, or may appeal from so much of the order as imposes a condition.²⁰⁴

If defendant does not serve the order or pay the costs imposed as a condition, judgment by default may be entered in disregard of the order.²⁰⁵

— **Requiring undertaking.** It is common practice to require a bond or undertaking to secure any judgment recovered.²⁰⁶

¹⁹⁵ Kane v. Demarest, 13 How. Pr. 465.

¹⁹⁶ Richardson v. Sun Printing & Pub. Ass'n, 20 App. Div. 329, 46 N. Y. Supp. 814.

¹⁹⁷ Delany v. Delany, 2 T. & C. 530.

¹⁹⁸ Sweet v. Metropolitan St. R. Co., 18 Misc. 355, 41 N. Y. Supp. 549.

¹⁹⁹ Hinz v. Starin, 25 State Rep. 329, 6 N. Y. Supp. 165.

²⁰⁰ Fuchs & L. Mfg. Co. v. Springer & Welty Co., 15 Misc. 443, 37 N. Y. Supp. 24.

²⁰¹ Mumford v. Sprague, 11 Paige, 438.

²⁰² Horn v. Brennan, 46 How. Pr. 479; Bank of Kinderhook v. Gifford, 40 Barb. 659.

²⁰³ McGilivray v. Standard Oil Co., 6 State Rep. 868; Thayer v. Mead, 2 Code R. 18.

²⁰⁴ Delany v. Delany, 2 T. & C. 530. Compare, however, Gale v. Vernon, 6 Super. Ct. (4 Sandf.) 709.

²⁰⁵ McGaffigan v. Jenkins, 1 Barb. 31.

²⁰⁶ Hornthal v. Finelite, 60 State Rep. 838, 29 N. Y. Supp. 686; Dudley v. Brinck, 8 Misc. 76, 28 N. Y. Supp. 527; Duncan v. Western Union Min. Co., 2 City Ct. R. 405. Giving of bond held unnecessary.

— **Requiring judgment to stand as security.** It is proper to require the judgment entered to stand as security,²⁰⁷ but not where the judgment is set aside because prematurely entered.²⁰⁸ Furthermore, it is severe and unusual to impose payment of costs of the action and also that the judgment stand as security unless the litigation is being continued in bad faith.²⁰⁹

A judgment by default for plaintiff allowed to stand as security when opened as far as to permit defense on merits must, although followed by judgment for plaintiff on the merits, remain of record unimpaired until the judgment entered upon the verdict has been paid, reversed, or in some legal form removed from the docket.²¹⁰ If the judgment has been docketed, the lien continues.²¹¹ Execution cannot issue thereon,²¹² and it follows that no action can be brought thereon.²¹³ Such a judgment does not determine any right of the parties in the action but exists merely as a security.²¹⁴ Plaintiff, on succeeding, may enter a new judgment notwithstanding the first remains on the record.²¹⁵

Glickman v. Loew, 29 App. Div. 479, 51 N. Y. Supp. 1078. Construction of undertaking. *Caponigri v. Cooper*, 70 App. Div. 124, 74 N. Y. Supp. 1116.

²⁰⁷ *Nitchie v. Smith*, 2 Johns. Cas. 286; *Selover v. Forbes*, 22 How. Pr. 477. On opening default, where the action would have abated by the death of defendant, and there had been delay in moving anew, the judgment should remain as security, rather than an undertaking be filed by defendant. *Hart v. Washburn*, 42 State Rep. 440, 17 N. Y. Supp. 85.

²⁰⁸ *Yates v. Guthrie*, 119 N. Y. 420.

²⁰⁹ *Brownell v. Rushman*, 11 Reporter, 584.

²¹⁰ *Negley v. Counting-Room Co.*, 2 How. Pr. (N. S.) 237.

²¹¹ *Holmes v. Bush*, 35 Hun, 637; *Hanse v. Fiero*, 25 Abb. N. C. 46, 10 N. Y. Supp. 494.

²¹² *Ford v. Whitridge*, 9 Abb. Pr. 416.

²¹³ *MacDougall v. Hoes*, 27 Misc. 590, 58 N. Y. Supp. 209.

²¹⁴ *Mott v. Union Bank*, 21 Super. Ct. (8 Bosw.) 591; *Holmes v. Rogers*, 18 State Rep. 652, 2 N. Y. Supp. 501.

²¹⁵ *Mott v. Union Bank*, 21 Super. Ct. (8 Bosw.) 591.

§ 2066. Validity of stipulations by attorney.

Counsel employed to argue a demurrer who suffers default has not implied authority to stipulate, in order to procure the opening of the default, that the decision on the demurrer should be final.²¹⁶ And an oral agreement by an attorney to pay any judgment plaintiff may recover, made as a condition of opening a default taken without the attorney's fault, and of waiving costs, is within the statute of frauds and not legally enforceable.²¹⁷

²¹⁶ *Baron v. Cohen*, 62 How. Pr. 367.

²¹⁷ *Lippmann v. Blumenthal*, 29 Misc. 335, 60 N. Y. Supp. 510..

CHAPTER III.

JUDGMENT BY CONFESSION.

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—— Executors and administrators.

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§ 2067. Nature of proceeding.

A judgment by confession is entered without summons, complaint, or appearance, and without the intervention of the court or even an attorney and without proof of any authority from the defendant except that inferred from his signature to the statement.

§ 2068. Purposes for which judgment may be confessed.

A judgment by confession may be entered without action,

Who May Confess Judgment.

either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both.¹ Thus a judgment may be confessed to secure future advances,² or to secure future indorsements,³ or to secure the performance of an executory contract.⁴ But judgment cannot be confessed for a tort,⁵ such as trespass.⁶ A judgment cannot be confessed to one person to secure him and also as trustee for another, as against subsequent creditors of the third person.⁷

§ 2069. Who may confess judgment.

Inasmuch as the confession of judgment is in the nature of security for a debt, it is held that neither an infant,⁸ a lunatic,⁹ nor an habitual drunkard,¹⁰ can confess judgment.

— **Married women.** A married woman may confess judgment.¹¹ Prior to 1897, a married woman could confess judgment only if the debt was contracted for the benefit of her separate estate or in the course of any trade or other business carried on by her on her sole and separate account.

— **Trustee.** A trustee cannot confess a judgment so as to bind the estate.¹²

— **Public officer.** It seems that a public officer may confess judgment in his official capacity.¹³

— **Executors and administrators.** An executor or administrator may confess judgment.¹⁴

¹ Code Civ. Proc. § 1273.

² Cook v. Whipple, 55 N. Y. 150; Wilder v. Fondoy, 4 Wend. 100.

³ Brinkerhoff v. Marvin, 5 Johns. Ch. 320.

⁴ Cook v. Cressy, 7 Alb. Law J. 141.

⁵ Burkham v. Van Saun, 14 Abb. Pr. (N. S.) 163.

⁶ Boutel v. Owens, 4 Super. Ct. (2 Sandf.) 655.

⁷ Marks v. Reynolds, 12 Abb. Pr. 403.

⁸ Bennett v. Davis, 6 Cow. 393; L'Amoureux v. Crosby, 2 Paige, 422.

⁹ Loomis v. Spencer, 2 Paige, 153.

¹⁰ L'Amoureux v. Crosby, 2 Paige, 422.

¹¹ Code Civ. Proc. § 1273.

¹² Mallory v. Clark, 20 How. Pr. 418.

¹³ Gere v. Cayuga County Sup'rs, 7 How. Pr. 255.

¹⁴ Lawrence v. Bush, 3 Wend. 305. But they cannot give a prefer-

— **Person under arrest.** A prisoner in custody under arrest cannot confess a valid judgment to satisfy the claim for which he was arrested.¹⁵

— **Joint debtors.** One or more joint debtors may confess a judgment for a joint debt, due or to become due. Where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against those only who confessed it; and it is not a bar to an action against all the joint debtors, upon the same demand.¹⁶ This Code provision should be liberally construed.¹⁷ One joint debtor may confess a judgment upon a joint debt, so as to be enforced against his individual property, but judgment against all cannot be entered on the confession of one.¹⁸

— **Insolvent corporation.** A corporation cannot confess judgment after it has petitioned for its dissolution.¹⁹

§ 2070. Statement.

A written statement must be made to the following effect:

1. It must state the sum for which judgment may be entered and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts out of which the debt arose; and must show that the sum confessed therefor is justly due, or to become due.

3. If the judgment to be confessed is for the purpose of

ence against an estate. *Columbus Watch Co. v. Hodenpyl*, 61 Hun, 557, 16 N. Y. Supp. 337.

¹⁵ *Richmond v. Roberts*, 7 Johns. 319; *Boutel v. Owens*, 4 Super. Ct. (2 Sandf.) 655. Contra, *Smith v. Storm*, 1 Wend. 37.

¹⁶ Code Civ. Proc. § 1278. Old cases as to power of partner to confess, see 10 Abb. Cyc. Dig. 648.

¹⁷ *Kantrowitz v. Kulla*, 13 Civ. Proc. R. (Browne) 74, 20 Abb. N. C. 321.

¹⁸ *Tripp v. Saunders*, 59 How. Pr. 379; *Schneider v. Levy*, 1 Month. Law Bul. 19. A creditor seeking in a court of equity to maintain his right to enforce securities given to him has not his equitable rights cut off by taking a judgment by confession against one of the joint debtors. *Remington Paper Co. v. O'Dougherty*, 36 Hun, 79.

¹⁹ Code Civ. Proc. § 2430. See, also, 4 Abb. Cyc. Dig. 246-248.

Statement.

securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability; and must show that the sum confessed therefor does not exceed the amount of the liability.²⁰ The object of the statute in requiring a detailed statement is to inform other creditors of the dealings out of which the indebtedness arose so that they can ascertain by proper inquiry whether the indebtedness is real or fictitious. In other words, it is to enable an interested party to ascertain whether the confession is "accurate, honest, and bona fide."²¹ It follows that the statement may be insufficient if attacked by other judgment creditors and yet sufficiently certain to render the judgment valid as between the parties thereto.²² There is questionable dicta to the effect that the statement is sufficient if it states facts which would be sufficient if stated in a complaint.²³ There is no distinction as to the particularity of statement required, between a confession to the original creditor, and to an assignee of the demand.²⁴

The facts to be stated are the general facts out of which the debt arose, sufficient to identify the transaction.²⁵ The confession should be for a certain and specified sum.²⁶ The specificity of a bill of particulars is not required,²⁷ and it is not necessary to state the amount of the indebtedness if it may be inferred from the statement that the sum confessed is

²⁰ Code Civ. Proc. § 1274.

²¹ Wood v. Mitchell, 117 N. Y. 439.

²² Robinson v. Hawley, 45 App. Div. 287, 61 N. Y. Supp. 138.

²³ Mather v. Mather, 38 App. Div. 32, 55 N. Y. Supp. 973; Fuller v. Straus, 44 App. Div. 348, 353, 60 N. Y. Supp. 917.

²⁴ Claflin v. Sanger, 11 Abb. Pr. 338.

²⁵ McDowell v. Daniels, 38 Barb. 143; Acker v. Acker, 1 Abb. Dec. 1, 1 Keyes, 291.

²⁶ Nichols v. Hewit, 4 Johns. 423.

²⁷ It is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, are concisely stated; and the character and dates of particular items need not be given. Gandall v. Finn, 2 Abb. Dec. 232, 1 Keyes, 217, 33 How. Pr. 444.

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justly due.²⁸ So it is not necessary to state in terms that the amount "is due or to become due"²⁹ nor that the indebtedness has not been paid or discharged.³⁰ If the confession is for goods sold and delivered, the statement need not state in detail the kind and quality of the goods purchased,³¹ nor, it seems, the exact time when the indebtedness was created,³² nor set forth an exact copy of the items of the account,³³ but it is not sufficient to merely allege a debt for goods sold and delivered without in any way showing the nature of the goods or their value.³⁴ A confession for money loaned is sufficient where the statement specifies the time of the loans, the items, the promise to pay, and the failure to pay;³⁵ but absence of facts as to the time of the loan is fatal.³⁶ If the accounts have been adjusted, however, it is sufficient to merely state the adjustment, the agreement to pay, and the failure to pay.³⁷ If the confession is on a promissory note, the statement must set forth the facts out of which the indebtedness arose,³⁸

²⁸ *Curtis v. Corbitt*, 25 How. Pr. 58; *Clements v. Gerow*, 1 Abb. Dec 370, 1 Keyes, 297.

^{29, 30} *Lanning v. Carpenter*, 20 N. Y. 447.

³¹ *Healy v. Preston*, 14 How. Pr. 20; *Mott v. Davis*, 15 How. Pr. 67.

³² *Delaware v. Ensign*, 21 Barb. 85; *Harrison v. Gibbons*, 71 N. Y. 58.

³³ *Neusbaum v. Keim*, 24 N. Y. 325.

³⁴ *Bradley v. Glass*, 20 App. Div. 200, 46 N. Y. Supp. 790; *Blackmer v. Greene*, 20 App. Div. 532, 47 N. Y. Supp. 113.

³⁵ *Miller v. Kosch*, 74 Hun, 50, 26 N. Y. Supp. 183.

³⁶ *Stebbins v. Methodist Episcopal Church*, 12 How. Pr. 410. A statement that money "was lent and advanced at divers times from the 1st Dec., 1853, to date," is insufficient. *Davis v. Morris*, 21 Barb. 152. A statement in a confession of judgment as follows: "This confession of judgment is for a debt now justly due to the said plaintiff from me arising from the following facts, viz., the said sum of \$5,000 is a balance due to said plaintiff of various sums of money loaned and advanced by him to me, the said defendant, during a period from about July 1, 1886, to date, and includes interest upon such loans and advances to this date," is not sufficient. *Wood v. Mitchell*, 117 N. Y. 439.

³⁷ *Critten v. Vredenburg*, 151 N. Y. 536.

³⁸ Merely describing the note is insufficient. *Chappel v. Chappel*, 12 N. Y. 215; *Combs v. Bowen*, 20 Wkly. Dig. 57. Stating that the note was given "on settlement of accounts," at a specified date, is insufficient. *Dunham v. Waterman*, 6 Abb. Pr. 257, 17 N. Y. 9. A statement

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though it is not necessary, in addition to stating the nature of the dealings out of which the consideration arose, to state all the particulars.³⁹

A confession to secure against contingent liability, as indorser on notes, need not state the date, time to run, amount, and place of payment of each note indorsed by the plaintiff.⁴⁰

of confession of judgment, which states generally that the judgment was on a note given for goods sold and delivered is insufficient. *Moody v. Townsend*, 3 Abb. Pr. 375. A statement without saying how much was lent is invalid as against creditors. It is not enough to state the evidence of a demand but the facts in which it originated must be stated. *Flour City Nat. Bank v. Doty*, 41 Hun, 76.

³⁹ *Acker v. Acker*, 1 Abb. Dec. 1; *McDowell v. Daniels*, 38 Barb. 143. A confession of judgment which contained the statement that prior to a date specified W. was indebted to M. for money loaned; that on that date they settled and adjusted the amount due at \$250, for which W. gave his note bearing date that day and payable to her order, and set forth a copy of the note stating also its transfer to the judgment creditor, was sufficient. *Wild v. Porter*, 22 App. Div. 179, 47 N. Y. Supp. 1036. The case of *Mather v. Mather*, 38 App. Div. 32, 55 N. Y. Supp. 973, holding that it is not necessary to state for what the notes were given except the general statement that the notes were given for money loaned and interest, seems, however, to carry the rule further than the other cases. A confession of judgment by the indorser of a note, after the usual recitals, stated: "Which note was duly discounted at said bank, after having been indorsed by me; said note was at maturity not paid, and was thereupon discounted, and now remains wholly unpaid, and there is now due from me thereon to said plaintiff the sum of \$80.38. And the sum confessed therefor is justly due." Held to make out a sufficient statement of the "facts out of which the debt arose," the words "duly discounted" being intended for "duly protested." *First Nat. Bank of Camden v. Carleton*, 43 App. Div. 6, 59 N. Y. Supp. 635.

⁴⁰ *Hopkins v. Nelson*, 24 N. Y. 518; *Healy v. Preston*, 14 How. Pr. 20. The consideration need not be stated, nor the fact that the notes had been discounted. *Marks v. Reynolds*, 12 Abb. Pr. 403. Stating the confession to be "for the plaintiff assuming the payment of a specified sum," at a bank named on the day of the date of the confession, by which a note made by the defendant, and payable at the bank, describing it by amount, date, and parties, was paid and taken up, is sufficient. *Lanning v. Carpenter*, 20 N. Y. 447; *Ely v. Cooke*, 28 N. Y. 365. But a judgment confessed to secure a contingent liability on a guaranty should be set aside on motion of a subsequent judgment cred-

Statement.

A schedule may be annexed to aid the statement,⁴¹ but the omission of one referred to in the statement as annexed will not invalidate the judgment where the statement is, of itself, sufficiently specific.⁴²

Mere defects in the statement do not invalidate the judgment as between the parties thereto.⁴³ Defects in the statement render the judgment voidable but not void.⁴⁴

— **Signature.** The statement must be signed by the defendant,⁴⁵ but the party's subscription to the affidavit added to his statement is a sufficient signing of the statement.⁴⁶

— **Verification.** The statement must be verified by the oath of the defendant to the effect that the matters of fact therein set forth are true.⁴⁷ It is not sufficient to state that the party "believes" the above statement of confession to be true.⁴⁸ This Code requirement has no relation to the jurisdiction of the court or the authority of the clerk to enter judg-

itor, if the statement on which it is entered does not show the particulars of the contract on which the liability rests; e. g., in case of a promissory note, if it does not show who are the parties to it, or the facts which impose a liability thereon on the plaintiff, and in behalf of the defendant, and such a liability as the defendant is bound to protect. *Wingobrenner v. Edgerton*, 39 Barb. 185, 8 Abb. Pr. 419, 17 How. Pr. 363.

⁴¹ *Mott v. Davis*, 15 How. Pr. 17.

⁴² *Clements v. Gerow*, 1 Abb. Dec. 370, 1 Keyes, 297.

⁴³ *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329; *Miller v. Earle*, 24 N. Y. 110; *Terrett v. Brooklyn Imp. Co.*, 18 Hun, 6.

⁴⁴ *Read v. French*, 28 N. Y. 285, 294.

⁴⁵ Code Civ. Proc. § 1274.

⁴⁶ *Mosher v. Heydrich*, 39 How. Pr. 161, 1 Abb. Pr. (N. S.) 258; *Purdy v. Upton*, 10 How. Pr. 494.

⁴⁷ Code Civ. Proc. § 1274. "Y. Z., being duly sworn, says that the facts stated in the above confession are true," is a sufficient verification. The word "confession" embraces the whole statement. *Schoolcraft v. Thompson*, 9 How. Pr. 61. An affidavit, "that the facts stated in the above confession are true," is sufficient as a verification. To say that the facts stated are true, is, in effect, saying that the statement is true. *Mosher v. Heydrich*, 1 Abb. Pr. (N. S.) 258, 39 How. Pr. 161. It seems, however, that the statement is good as against the debtor though not verified. *Stone v. Williams*, 40 Barb. 322.

⁴⁸ *Ingram v. Robbins*, 33 N. Y. 409.

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ment. Its only purpose is to protect creditors from judgments fraudulently confessed by an insolvent debtor, and if it be not confessed in conformity with the provisions of the Code, it is not absolutely void, but voidable at the instance of certain creditors only.⁴⁹ The verification is amendable.⁵⁰

— **Amendment.** The statement is amendable⁵¹ except where the confession was with intent to defraud other creditors.⁵² The court has "power" to allow "nunc pro tunc" an amendment where the statement is insufficient but a refusal thereof is discretionary.⁵³ The court may impose, as a condition, that the lien of the judgment be subordinate to subsequent judgments.⁵⁴ So the amendment has been allowed, in opposition to a motion to vacate the judgment, so as to validate the judgment nunc pro tunc as against all subsequent creditors except the moving party.⁵⁵

— Form of statement.

[Venue.]

[Title of action.]

I do hereby confess judgment in this action in favor of ——— for the sum of ——— dollars and authorize judgment to be entered therefor against myself.

This confession of judgment is for a debt justly due to the plaintiff, arising on the following facts: [here state facts].

A. X.,
Defendant.

⁴⁹ Teel v. Yost, 128 N. Y. 387.

⁵⁰ Amendment may be allowed to defeat motion to set aside judgment. Cook v. Whipple, 55 N. Y. 150; Ingram v. Robbins, 33 N. Y. 409.

⁵¹ It being entirely the fault of the attorney that a statement of a certain fact was omitted in the written confession of judgment, an amendment was allowed. Ingram v. Robbins, 33 N. Y. 409.

⁵² Simons v. Goldbach, 56 Hun, 204, 9 N. Y. Supp. 359.

⁵³ Combs v. Bowen, 20 Wkly. Dig. 57. See, also, Davis v. Morris, 21 Barb. 152; National Park Bank v. Salomon, 17 Civ. Proc. R. (Browne) 8, 5 N. Y. Supp. 632.

⁵⁴ Symson v. Silheimer, 40 Hun, 116.

⁵⁵ Insufficiency of a statement result of inadvertence. Bradley v. Glass, 20 App. Div. 200, 46 N. Y. Supp. 790.

Entry of Judgment.

[Vennee.]

—, the defendant above named, being duly sworn, says that the above statement and confession of judgment, and the facts therein mentioned, are true to his own knowledge.

[Jurat.]

2071. Entry of judgment.

At any time within three years after the statement is verified, it may be filed with a county clerk, or, where the sum for which judgment is confessed, does not exceed two thousand dollars, exclusive of interest from the time of making the statement, with the clerk of the city court of the city of New York. Thereupon the clerk must enter, in like manner as a judgment is entered in an action, a judgment for the sum confessed, with costs which he must tax, to the amount of fifteen dollars, besides disbursements taxable in an action. If the statement is filed with a county clerk, the judgment must be entered in the supreme court; if it is filed with the clerk of another court specified in this section, the judgment must be entered in the court of which he is clerk.⁵⁶ But a judgment by confession cannot be entered after the death of the defendant.⁵⁷ The judgment is not invalid because of the lapse of nearly a year after the verification of the statement before the entry of judgment.⁵⁸ The statement need not be filed and the judgment entered in the county in which the statement was verified.⁵⁹ There is no judgment or lien until the clerk enters the judgment.⁶⁰ But the rights of a party will not be injured as against subsequent judgments by the failure of the clerk to enter the judgment.⁶¹

⁵⁶ Code Civ. Proc. § 1275.

⁵⁷ Code Civ. Proc. § 1275. Not even if the death is on the same day. *Maddock v. Stevens*, 15 Civ. Proc. R. (Browne) 248, 3 N. Y. Supp. 528.

⁵⁸ *Curtis v. Corbitt*, 25 How. Pr. 58.

⁵⁹ *Mosher v. Heydrich*, 1 Abb. Pr. (N. S.) 258, 30 How. Pr. 161.

⁶⁰ *Blydenburgh v. Northrop*, 13 How. Pr. 289.

⁶¹ *Neele v. Berryhill*, 4 How. Pr. 16.

Entry of Judgment.

— Form of judgment endorsed on statement.

On filing the within statement and confession, it is adjudged by the court that the plaintiff do recover against the defendant the sum of ——— dollars, with ——— dollars, costs, and ——— dollars, disbursements, making in all the sum of ———.

[Signature of clerk.]

[Date.]

[Signature of plaintiff's attorney.]

— **Judgment roll.** The clerk, immediately after entering the judgment, must attach together and file the statement, as verified, and a copy of the judgment, which constitute the judgment roll.⁶²

— **Docketing and enforcement.** The judgment may be docketed, and enforced against property, in the same manner and with the same effect as a judgment in an action rendered in the same court; and each provision of law relating to a judgment in an action, and the proceedings subsequent thereto, apply to a judgment thus taken.⁶³ It has been said that the judgment does not differ from any other judgment except in the mode of obtaining it.⁶⁴ Notice of an undocketed confession is not notice of a lien.⁶⁵ The lien acquired by filing a transcript in another county is not affected by the fact that the judgment had not been entered by the clerk at the time he delivered the transcript.⁶⁶ The enforcement of the judgment may be limited by agreements entered into at the time the judgment was confessed.⁶⁷ The judgment does not necessarily merge the original indebtedness.⁶⁸

^{62, 63} Code Civ. Proc. § 1276.

⁶⁴ Lanning v. Carpenter, 23 Barb. 402, 404.

⁶⁵ Blydenburgh v. Northrop, 13 How. Pr. 289.

⁶⁶ Steuben County Bank v. Alberger, 78 N. Y. 252.

⁶⁷ Sizer v. Miller, 2 How. Pr. 44; Peck v. Peck, 110 N. Y. 64.

⁶⁸ Where the maker of a note confessed judgment to his accommodation indorser, as collateral security, and the indorser took up the note, the note was not merged in the judgment, and the indorser might enforce his right through either. *Benedict v. Hollday*, 3 Wkly. Dig. 420. A collateral security of a higher nature, e. g., a bond and warrant of attorney, on which judgment is entered, does not extinguish the original contract, so long as the judgment is unsatisfied. *Day v. Leal*, 14 Johns. 404. A judgment confessed for a debt secured by a

Entry of Judgment.

— **Execution where judgment is not all due.** "Where the debt, for which the judgment is rendered, is not all due, execution may be issued, upon the judgment, for the collection of the sum which has become due. The execution must be in the form prescribed by law, for an execution upon a judgment for the full amount recovered; but the person, whose name is subscribed to it, must indorse thereupon a direction to the sheriff, to collect only the sum due, stating the amount thereof, with interest thereon, and the costs of the judgment. Notwithstanding the issuing and collection of such an execution, the judgment shall remain, as security for the sum or sums to become due, after the execution is issued. When a further sum becomes due, an execution may, in like manner, be issued for the collection thereof; and successive executions may be issued, as further sums become due."⁶⁹ The word "due," as used herein, means payable.⁷⁰ The execution must follow the judgment,⁷¹ and, where it is indorsed with a direction to the sheriff to collect more than is due, it may be directly attacked by a junior execution creditor.⁷² The effect of the provision that "the judgment shall remain as security for the sum or sums becoming due after the execution is issued," is to make the judgment security to the same extent as any other judgment for a like amount would be upon which no execution has been issued, and hence the judgment is not a lien on personality.⁷³ A judgment creditor may maintain an action against his debtor and those in whose favor the latter has confessed judgments, where it appears that the debt for which one of the judgments was confessed existed but had not become due, for the purpose of preventing the issuance of execution thereon until the maturity of the debt.⁷⁴

chattel mortgage, and as collateral to the mortgage, does not extinguish the mortgage. *Butler v. Miller*, 5 Denio, 159. But see *Fields v. Bland*, 81 N. Y. 239.

⁶⁹ Code Civ. Proc. § 1277.

⁷⁰ *Adams v. Tator*, 57 Hun, 302, 10 N. Y. Supp. 617.

⁷¹ *National Park Bank v. Salemon*, 17 Civ. Proc. R. (Browne) 8, 5 N. Y. Supp. 622.

⁷² *Jaffray v. Salsomann*, 52 Hun, 561, 5 N. Y. Supp. 629.

⁷³ *Forrester v. Strause*, 21 Civ. Proc. R. (Browne) 166, 18 N. Y. Supp. 41.

§ 2072. Vacating the judgment.

The usual procedure is to move to vacate the judgment although an action may be brought.⁷⁵ The pendency of an action in another court to set aside the judgment bars a motion for relief in the court in which judgment was entered.⁷⁶ The moving party must make his showing by a preponderance of proof.⁷⁷

— **Who may move.** A motion to vacate a judgment by confession may be made not only by the judgment debtor but may also be made by a junior judgment creditor,⁷⁸ or by a receiver of the property of a judgment debtor,⁷⁹ or by the committee of an habitual drunkard,⁸⁰ or by a grantee or mortgagee of land on which the judgment is a lien;⁸¹ but a mere creditor at large cannot move to vacate.⁸² An assignee for benefit of creditors may move to set aside the judgment as in fraud of other creditors.

— **Grounds.** The most usual ground of the motion or action is the insufficiency of the statement. Mere defects in the statement will not, however, warrant the setting aside of a "sale" under the judgment, at the instance of a subsequent judgment creditor.⁸³ Usury,⁸⁴ fraud,⁸⁵ confession in excess

⁷⁵ *Dunham v. Waterman*, 17 N. Y. 9; *Miller v. Earle*, 24 N. Y. 110.

⁷⁶ *Hay v. Cole*, 90 Hun, 258, 35 N. Y. Supp. 950.

⁷⁷ *Williams v. Hernon*, 33 How. Pr. 241.

⁷⁸ *Utter v. McLean*, 53 Hun, 568, 6 N. Y. Supp. 281; *Lowber v. City of New York*, 5 Abb. Pr. 325; *Chappel v. Chappel*, 12 N. Y. (2 Kern.) 215. But a judgment entered on a defective statement will not be set aside on motion of a creditor whose judgment is also entered on a defective statement. *Rae v. Lawser*, 18 How. Pr. 23.

⁷⁹ *Seligman v. Franco-American Trading Co.*, 17 Civ. Proc. R. (Browne) 342, 5 N. Y. Supp. 681.

⁸⁰ *Matter of McLaughlin*, Clarke Ch. 113.

⁸¹ *Norris v. Denton*, 30 Barb. 117. But see *Kendall v. Hodgins*, 14 Super. Ct. (1 Bosw.) 659.

⁸² *Wintringham v. Wintringham*, 20 Johns. 296; *Bentley v. Goodwin*, 38 Barb. 633. Attachment creditor cannot attack execution sale made before his attachment was levied. *Burtis v. Dickinson*, 81 Hun, 343, 30 N. Y. Supp. 886.

⁸³ *Harrison v. Gibbons*, 71 N. Y. 58.

⁸⁴ *Lansing v. McKillup*, 1 Cow. 35.

Vacating the Judgment.

of the indebtedness,⁸⁶ and want of cause of action at the time the judgment was confessed,⁸⁷ are also grounds. A subsequent judgment creditor cannot raise the objection that the contract on which the judgment was based was prohibited by statute where neither party to the judgment has urged any such objection.⁸⁸ The existence of a defense to the debt confessed, in the absence of mistake, does not warrant its being urged for the first time after the confession of judgment.⁸⁹

— **Time for motion.** A motion to set aside a judgment because entered on an insufficient statement need not be made within a year.⁹⁰

— **Notice of motion.** A motion by a creditor to vacate a judgment by confession, entered against his debtor, founded on the ground that the statement is insufficient to authorize a judgment to be entered, is not a motion for irregularity, within the rule requiring the notice or order to show cause to specify the irregularity complained of.⁹¹

— **Order.** As already stated, the court may permit an amendment of the statement to defeat the motion where based on the insufficiency of the statement.⁹² So the judgment may be sustained in part where the statement is insufficient only as to a part of the indebtedness,⁹³ or where it is good as against

⁸⁶ *Utter v. McLean*, 53 Hun, 568, 6 N. Y. Supp. 281. See, also, *Galle v. Tode*, 148 N. Y. 279.

⁸⁷ *Illinois Watch Co. v. Payne*, 39 App. Div. 521, 57 N. Y. Supp. 308.

⁸⁸ *Forrester v. Strauss*, 21 Civ. Proc. R. (Browne) 166, 18 N. Y. Supp. 41.

⁸⁹ *Parker v. Rochester*, 4 Johns. Ch. 329.

⁹⁰ *Shufelt v. Shufelt*, 9 Paige, 137.

⁹¹ *Bonnell v. Henry*, 13 How. Pr. 142; *Winnebrenner v. Edgerton*, 30 Barb. 185, 8 Abb. Pr. 419, 17 How. Pr. 363. Contra, *Whitney v. Kenyon*, 7 How. Pr. 458.

⁹² *Winnebrenner v. Edgerton*, 8 Abb. Pr. 419, 30 Barb. 185, 17 How. Pr. 363.

⁹³ *Mitchell v. Van Buren*, 27 N. Y. 390; *Union Bank v. Bush*, 36 N. Y. 631.

⁹⁴ *Harrison v. Gibbons*, 71 N. Y. 58.

Collateral Attack.

a part of the debtors;⁹⁴ but where the judgment includes a fraudulent item, it must be set aside in toto.⁹⁵

§ 2073. Collateral attack.

The judgment may be collaterally attacked on the ground that the alleged indebtedness on which it was based was fraudulent.⁹⁶

⁹⁴ *Watkins v. Abrahams*, 24 N. Y. 72.

⁹⁵ *Simons v. Goldbach*, 56 Hun, 204, 9 N. Y. Supp. 359.

⁹⁶ *Trebilcox v. McAlpine*, 62 Hun, 317, 17 N. Y. Supp. 221.

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ART. I. GENERAL RULES.

§ 2074. Scope of chapter and Code provisions considered.

The general provisions of the Code as to costs are found in chapter twenty-one of the Code, sections 3228 to 3332, inclusive. This chapter is intended to cover the same ground covered by the Code chapter and no more, except that costs on appeal are left for consideration in the volume covering appellate practice and that security for costs has already been treated of in a preceding volume.¹ Costs in special actions and in special proceedings, where regulated by Code provisions in chapters of the Code relating to such actions or proceedings, will not be considered in this chapter but in connection with the chapters relating to such actions or proceedings. So the question of the power of the court to impose the payment of costs as a condition of granting a favor, which has already been discussed in previous chapters relating to particular motions, will not be reconsidered. So the right to sue as a poor person,² or the effect on costs of a tender³ or offer of judgment,⁴ or the stay of proceedings because of failure to pay costs of a motion or of a prior action,⁵ has been fully treated of in preceding volumes.

¹ Volume 2, pp. 1882-1919.

² Volume 2, pp. 1872-1881.

³ Volume 2, pp. 2005-2013.

⁴ Volume 2, pp. 1989-2004.

⁵ Volume 2, pp. 1912-1916.

In looking up a question of costs in a special action or special proceeding, it is always advisable first to see if the provisions of the Code or Revised Statutes governing the procedure in such action or proceeding make any provisions as to costs, since the Code provisions fixing the right to costs, as found in sections 3228 to 3250 of the Code, do not affect any provision contained elsewhere in the Code, or in any other statute, whereby the award of costs is specially regulated, in a particular case, otherwise than as prescribed in said Code provisions.⁶ Furthermore, the Code provisions fixing the "amount" of costs, as contained in chapter twenty-one of the Code, do not affect any provision contained elsewhere in the Code, or in any other unrepealed statute, whereby the amount of costs is specially fixed, in a particular case, otherwise than as prescribed in such provisions.⁷

§ 2075. Definition, nature, and purpose.

The Code does not define the word "costs." The old Code defined costs as certain sums allowed to the prevailing party on the judgment by way of indemnity for his expenses in the action. Costs have also been defined as a pecuniary allowance, made by positive law, to the successful party in a suit, or distinct proceeding within a suit, in consideration of, and to reimburse, his probable expenses.⁸ Costs are to be distinguished from fees in that the one is an allowance to a party for expenses incurred in conducting his suit, while the other is compensation to an officer for services rendered in the progress of the cause. The term "costs" is not synonymous with "disbursements" although it is frequently used in a comprehensive sense to include "disbursements."⁹

Costs are in the nature of damages although they cannot now

⁶ Code Civ. Proc. § 3250. See *Furman v. Cunningham*, 34 Hun, 606; *Matter of New York, L. & W. R. Co.*, 14 Wkly. Dig. 329.

⁷ Code Civ. Proc. § 3261.

⁸ Abb. Law Dict.

⁹ *Judson v. City of Olean*, 40 Hun, 158. When the amount of costs is limited by law, this includes costs and disbursements. *Wheeler v. Westgate*, 4 How. Pr. 269; *Ryan v. Farley*, 3 Month. Law Bul. 78.

be awarded as such by the jury. They were originally given rather as a punishment of the defeated party for causing the litigation than as a recompense to the successful party for his expenses. A recovery of costs is usually in favor of one party against the other but in equity the costs may, in a proper case, be in favor of one party against a co-party or may be made payable out of a fund.

§ 2076. Final and interlocutory costs.

Costs are either interlocutory, such as arise on some distinct and separate proceeding during the course of a suit as upon a motion, or final, such as depend on the event of the suit, and are granted only on its termination.¹⁰ Under the old Code, costs granted on a demurrer, where an issue of fact remained to be tried, were final costs which could not be taxed until final judgment was entered,¹¹ but now they are interlocutory costs which may be collected in the same way as motion costs.¹² Costs on granting judgment because of the frivolousness of the answer are interlocutory costs,¹³ as are costs on appeal from an interlocutory order.¹⁴

§ 2077. Right to costs as dependent on statute.

Costs cannot be recovered unless authorized by statute. This rule applies to actions seeking legal relief,¹⁵ and to special proceedings,¹⁶ and, it would seem, to actions seeking equitable relief.¹⁷ It has been held, however, that equity has in-

¹⁰ 5 Enc. Pl. & Pr. 107.

¹¹ *Palmer v. Smedley*, 13 Abb. Pr. 185; *Mora v. Sun Mut. Ins. Co.*, 13 Abb. Pr. 304.

¹² Code Civ. Proc. §§ 3232, 3233.

¹³ *Wilkin v. Raplee*, 52 N. Y. 248.

¹⁴ *Matter of Brasier*, 13 Daly, 245.

¹⁵ *Barry v. Winkle*, 36 Misc. 171, 73 N. Y. Supp. 188; *Kuskie v. Hendrickson*, 128 N. Y. 555; *Munson v. Curtis*, 43 Hun, 214; *Ward v. James*, 8 Hun, 526.

¹⁶ *Matter of Holden*, 126 N. Y. 589; *Matter of Brooklyn*, 148 N. Y. 107.

¹⁷ *Struthers v. Christal*, 3 Daly, 327.

herent power to award trustees their expenses of litigation, out of the trust property.¹⁸

§ 2078. Power of court or referee.

The power to award costs is given to the court while the taxation or computation thereof is generally imposed by law on the clerk of the court. The power to award costs is purely the creature of statute and inasmuch as the courts have no inherent power, they must be governed entirely by the terms of the statute. If costs follow the judgment as a matter of course, the court has nothing to do with them except that in some cases a certificate may be required of the presiding judge or referee to show the right to costs.¹⁹ If costs are discretionary, as in equity suits or in special proceedings or motion costs, none can be recovered unless the court or referee expressly awards them in the order, decision, or report.²⁰ If the court before which the final determination of a case is heard does not award costs there is no authority elsewhere to adjudge costs.²¹ Thus, in an equitable action, where no direction is made as to costs, they will not be allowed, after entry of judgment, at a special term held by another than the trial judge.²² A judgment which is erroneous in respect to costs, by reason of having been entered without application to the court, in a case where costs could only be awarded by order of the court,

¹⁸ *Downing v. Marshall*, 37 N. Y. 380. Costs to guardian ad litem. *Salls v. Salls*, 28 Abb. N. C. 117, 19 N. Y. Supp. 246; *Weed v. Paine*, 31 Hun, 10.

¹⁹ If the right to costs is declared by statute, the court has no discretion. *Sturgis v. Spofford*, 58 N. Y. 103; *Burdick v. Hale*, 13 Abb. N. C. 60.

²⁰ *Kahn v. Schmidt*, 83 Hun, 541, 32 N. Y. Supp. 33. Costs of motion must be specified in the order (*Chadwick v. Brother*, 4 How. Pr. 283; *Johnson v. Jillitt*, 7 How. Pr. 485; *Siegrist v. Holloway*, 7 Civ. Proc. R. [Browne] 58) except where the motion is one in the direct and regular progress of the suit, such as a motion for a nonsuit (*Thomas v. Clark*, 5 How. Pr. 375).

²¹ *Eldridge v. Strenz*, 39 Super. Ct. (7 J. & S.) 295; *Travis v. Waters*, 1 Johns. Ch. 85.

²² *Le Roy v. Browne*, 10 N. Y. Supp. 328.

should not be wholly set aside on that ground, but the costs only may be stricken out, without prejudice to an application to the court to allow costs.²³ If the court of appeals affirms a judgment of the appellate division reversing a judgment of the special term, and directs judgment absolute, the latter has power to award costs.²⁴ The power of a referee to award costs has been considered in a preceding chapter.²⁵

— **Where court is without jurisdiction.** The court has power to award costs against plaintiff, though it dismisses the action because of want of jurisdiction of the subject-matter,²⁶ especially where the want of jurisdiction does not appear on the face of the summons or complaint.²⁷ This rule applies though the question arises on a demurrer.²⁸

— **Stipulations as to costs.** While parties cannot, by agreement, compel the award of costs, they may waive the allowance of costs the same as they may waive any legal right.²⁹ So costs may be waived by stipulation where a controversy is submitted on agreed facts.³⁰ The "parties" to any proceeding may stipulate for the payment of costs, in the absence of a statute or beyond the terms thereof, and their agreement will be enforced, but the "attorneys" in a cause cannot agree to increase the costs beyond the statutory allowance.³¹ The stipulation as to costs may be enforced by the court in rendering judgment.³²

²³ *Howe v. Lloyd*, 9 Abb. Pr. (N. S.) 257, 2 Lans. 335.

²⁴ *Barnard v. Hall*, 143 N. Y. 339.

²⁵ See ante, pp. 2599, 2607.

²⁶ *Day v. Sun Ins. Office*, 40 App. Div. 305, 57 N. Y. Supp. 1033; *Donnelly v. Libby*, 31 Super. Ct. (1 Sweeny) 259, 287; *Humiston v. Ballard*, 63 Barb. 9.

²⁷ *Harriott v. New Jersey R. & Transp. Co.*, 1 Daly, 377; *Chambers v. Feron & Ballou Co.*, 56 N. Y. Supp. 338.

²⁸ *King v. Poole*, 36 Barb. 242.

²⁹ *Real Estate Corp. v. Harper*, 174 N. Y. 123, 13; *Simon v. O'Brien*, 87 Hun, 160, 33 N. Y. Supp. 815.

³⁰ *Real Estate Corp. v. Harper*, 174 N. Y. 123, 131; *Brenen v. North*, 7 App. Div. 79, 39 N. Y. Supp. 975; overruling *Landon v. Walmuth*, 76 Hun, 271, 27 N. Y. Supp. 717.

³¹ *O'Keefe v. Shipherd*, 23 Hun, 171.

³² *Fish v. Coster*, 28 Hun, 64; *People v. Fitchburg R. Co.*, 44 State Rep. 229, 18 N. Y. Supp. 269.

§ 2079. What law governs.

The power to award costs, as well as the amount and items to be allowed, depend on the statutes in force, not at the commencement but at the termination of the controversy, the time when the right to costs accrues,³³ i. e., on the delivery of a final decision authorizing judgment,³⁴ or on the rendition of a verdict,³⁵ or on the delivery of the report of a referee.³⁶ On entering judgment by default, the right accrues at the time of the taxation and the statute in force at that time governs.³⁷ Inasmuch as the right to costs does not accrue until final decision, it is competent for the legislature, at any time during the progress of a suit, to create an allowance for services not before provided for, and to increase or diminish, or wholly abolish, such allowances as existed at the time of the suit.³⁸ Of course, the costs are governed by the laws of the state in which the suit is instituted.

§ 2080. Prolonging litigation to determine right to costs.

After settlement by the parties, the court will not decide upon the merits, to determine the question of costs, though reserved by the parties.³⁹ But an equity case will be heard, although the subject-matter has ceased to exist before the trial, to determine the right to costs as it existed at the time of the commencement of the action.⁴⁰

³³ *Supervisors of Onondaga v. Briggs*, 3 Denio, 173; *Defendorf v. Defendorf*, 42 App. Div. 166, 59 N. Y. Supp. 163; *Munson v. Curtis*, 43 Hun, 214; *Garling v. Ladd*, 27 Hun, 112.

³⁴ *Hunt v. Middlebrook*, 14 How. Pr. 300.

³⁵ *Moore v. Westervelt*, 14 How. Pr. 279; *Burnett v. Westfall*, 15 How. Pr. 430. Dismissal of complaint is same as verdict. *Scudder v. Gori*, 18 Abb. Pr. 207. Where verdict is set aside, the costs are to be governed by the law existing at the time the final verdict is rendered. *Jackett v. Judd*, 18 How. Pr. 385.

³⁶ *Hunt v. Middlebrook*, 14 How. Pr. 300. Contra, *Torry v. Hadley*, 14 How. Pr. 357, which holds that time of "filing" the report governs.

³⁷ *Steward v. Lamoreaux*, 5 Abb. Pr. 14. Contra, *Huber v. Lockwood*, 15 How. Pr. 74.

³⁸ *Supervisors of Onondaga v. Briggs*, 3 Denio, 173.

³⁹ *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Stewart v. Ellice*, 2 Paige, 604.

⁴⁰ *Kelley v. McMahon*, 37 Hun, 212.

§ 2081. Ownership.

Though the authorities are in conflict, the better opinion seems to be that costs are the property of the party recovering them and not of his attorney,⁴¹ yet when included in the judgment, the lien of the attorney attaches thereto as well as to the recovery outside of costs.⁴²

§ 2082. Waiver of right to costs.

Refusal to accept costs imposed as a condition of awarding a new trial, pending an appeal from the order, does not preclude the right of the party defeated on his appeal to demand the payment of such costs.⁴³ So where plaintiff recovered less than the statutory amount so that defendant was entitled to costs, but defendant neglected to enter the same on the roll because plaintiff was insolvent, he did not waive his right.⁴⁴

§ 2083. Waiver of objections.

If a party is not awarded costs in a case where costs are a matter of discretion, objection must be taken at the time to the decision, report, or order.⁴⁵ Serving an offer to allow judgment to be entered for a specific sum, "with costs," is not such a recognition of liability for costs as to preclude the party from claiming that they can only be awarded on an application to the court, especially where the offer is refused by the adverse party.⁴⁶ One does not by objecting to the items of the bill on taxation waive his right to oppose the motion for costs.⁴⁷ It seems that the mere taking of the appeal is not a

⁴¹ Volume 1, p. 259. See note in 10 Ann. Cas. 461.

⁴² *Barry v. Third Ave. R. Co.*, 87 App. Div. 513, 84 N. Y. Supp. 830; *Bevins v. Albro*, 86 Hun. 590, 33 N. Y. Supp. 1979; *Kunath v. Bremer*, 53 App. Div. 271, 65 N. Y. Supp. 830.

⁴³ *Stokes v. Stokes*, 38 App. Div. 215, 56 N. Y. Supp. 637.

⁴⁴ *Hoyt v. Blain*, 12 Wend. 188.

⁴⁵ See *Schmidt v. Brown*, 80 Hun. 183, 30 N. Y. Supp. 65.

⁴⁶ *Howe v. Lloyd*, 9 Abb. Pr. (N. S.) 257, 2 Lans. 335.

⁴⁷ *Knapp v. Curtiss*, 6 Hill. 386.

waiver of the right to object to the insertion of any costs whatever.⁴⁸

ART. II. RECOVERY OF COSTS.

(A) WHERE A MATTER OF RIGHT.

§ 2084. General considerations.

Section 3228 of the Code enumerates the actions in which plaintiff is entitled to costs, of course, on the rendering of a final judgment in his favor. In such cases, the court has no discretion.⁴⁹ This Code subdivision applies only to actions at law as distinguished from suits in equity;⁵⁰ and where the action is at law, a money judgment is demanded, and the recovery is for more than \$50, the fact that a jury trial is waived does not make the question of costs a discretionary one,⁵¹ nor does the fact that an equitable defense has been successfully interposed.⁵² The question whether the costs are discretionary depends on the complaint and not on the answer.

Section 3229 provides that defendant is entitled to costs, of course, in the actions specified in section 3228 unless plaintiff is entitled to costs. Thus, in a common-law action, where plaintiff would, if successful, be entitled to costs as of course, it follows that if the complaint is dismissed the defendant is entitled to costs as of course.⁵³ And this is so though defendant has interposed and afterwards withdrawn a counterclaim.⁵⁴ And if defendant recovers on a counterclaim, though less than fifty dollars, he is entitled to costs.⁵⁵ The plaintiff, in an action in which a counterclaim is set up, if he fails to establish a right to recover, is not entitled to costs merely because no recovery is had upon the counterclaim.⁵⁶ But where plaintiff

⁴⁸ *Marshall v. Boyer*, 52 Hun, 181, 5 N. Y. Supp. 150.

⁴⁹ *Boardway v. Scott*, 31 Hun, 378.

⁵⁰ *Law v. McDonald*, 9 Hun, 23.

⁵¹ *Norton v. Fancher*, 92 Hun, 463, 36 N. Y. Supp. 1032.

⁵² *Lanz v. Trout*, 46 How. Pr. 94; *Cythe v. La Fontain*, 51 Barb. 186.

⁵³ *Rugen v. Collins*, 8 Hun, 384.

⁵⁴ *Thayer v. Holland*, 11 Daly, 187, 63 How. Pr. 179.

⁵⁵ *Smith v. Bryant*, 29 Misc. 564, 61 N. Y. Supp. 943.

⁵⁶ *Thayer v. Holland*, 11 Daly, 187, 63 How. Pr. 179; *Whitelegge v. De Witt*, 12 Daly, 319.

recovers against an executor or administrator on a legal cause of action, costs cannot be awarded to the defendant though under sections 1835 and 1836 of the Code they are denied to the plaintiff,⁵⁷ since such action is not embraced within section 3228 of the Code. A defendant who obtains a judgment against a co-defendant does not recover costs as of course.⁵⁸

These two Code sections do not apply to actions commenced in a district or municipal court and removed into the city court of New York City.⁵⁹

§ 2085. Actions involving title to real property.

The Code provides that plaintiff is entitled to costs, of course, on the rendering of a final judgment in his favor, in an action, triable by a jury, to recover real property, or an interest in real property, or in which a claim to real property arises on the pleadings or is certified to have come in question on the trial.⁶⁰ The amount of damages found is immaterial,⁶¹ i. e., plaintiff is entitled to costs though he recovers less than fifty dollars where he succeeds as to his title.

— **Action "triable by a jury."** It will be noticed that the action, to carry costs as of course, must be triable by a jury. It follows that an equitable action in which a jury trial cannot be demanded as of right does not entitle a successful plaintiff to costs though title is involved.⁶²

— **What is real property.** The question of the right of property in growing trees and shrubs is a question of title to real property.⁶³ So the right to the exclusive ownership of, and dominion over, land under the waters of a navigable river, involves title to real property.⁶⁴

⁵⁷ *Hopkins v. Lott*, 111 N. Y. 577, 580; *Baine v. Rochester*, 85 N. Y. 523.

⁵⁸ See post, p. 2931.

⁵⁹ *Levene v. Hahner*, 62 App. Div. 195, 70 N. Y. Supp. 913.

⁶⁰ Code Civ. Proc. § 3228, subd. 1.

⁶¹ *Crowell v. Smith*, 35 Hun, 182; *Hall v. Hodskins*, 30 How. Pr. 15.

⁶² *Black v. O'Brien*, 23 Hun, 82.

⁶³ *Powell v. Rust*, 8 Barb. 567.

⁶⁴ *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 60 N. Y. Supp. 12.

— **When claim arises "on the pleadings."** A claim of title in the complaint alone is not a "claim of title on the pleadings."⁶⁵ So an unnecessary allegation of title, though denied, does not bring the title to land into question.⁶⁶ For the purpose of determining the question of costs, a claim of title to real property arises upon the pleadings, only when such an issue is essentially or legitimately presented by the pleadings as essential to the plaintiff's cause of action, as distinguished from the evidence requisite to a recovery.⁶⁷ In other words, the claim of title must be such that if proved it will defeat or maintain the action.⁶⁸ It is immaterial that another issue also arises on the pleadings;⁶⁹ but the claim of title must arise on the whole pleadings and the recovery must be "in hostility to such claim," i. e., it is not sufficient that the recovery be on an issue distinct from that of title.⁷⁰

— **When claim arises on the trial.** Whenever, under the pleadings, it becomes necessary for plaintiff to prove, and he gives evidence of, title, such title comes in question on the trial, notwithstanding defendant offers no evidence in regard thereto.⁷¹

— **What is meant by "title."** "Title" means "right of possession."⁷²

⁶⁵ *Lynk v. Weaver*, 128 N. Y. 171.

⁶⁶ *Aaron v. Foster*, 11 Civ. Proc. R. (Browne) 325, 3 State Rep. 270; *Quinn v. Winter*, 15 Daly, 383, 7 N. Y. Supp. 755. Allegation of title a conclusion of law. *Bloomington v. Stenbing*, 11 Misc. 549, 35 N. Y. Supp. 1074. So in an action by a landlord against his tenant, title is not in issue merely because plaintiff unnecessarily pleads title and defendant enters a general denial. *Cleveland v. Wilder*, 78 Hun, 591, 29 N. Y. Supp. 209. Contra, *Dempsey v. Hall*, 35 Super. Ct. (3 J. & S.) 201. So held in an action for damages from the bite of a dog where the answer set up that plaintiff was a trespasser. *Pierret v. Moller*, 3 E. D. Smith, 574. So held in action for assault and battery. *Langdon v. Guy*, 91 N. Y. 660; *Welsh v. Fallihee*, 75 Hun, 308, 27 N. Y. Supp. 81.

⁶⁷ *Bailey v. Daigler*, 50 Hun, 538, 3 N. Y. Supp. 718.

⁶⁸ *Dunster v. Kelly*, 110 N. Y. 558.

⁶⁹ *Powell v. Rust*, 8 Barb. 567, 569.

⁷⁰ *Burhans v. Tibbitts*, 7 How. Pr. 74; *Learn v. Currier*, 15 Hun, 184.

⁷¹ *Taylor v. Wright*, 36 App. Div. 568, 55 N. Y. Supp. 761.

⁷² *Dunster v. Kelly*, 110 N. Y. 558; *Ehle v. Quackenboss*, 6 Hill, 537.

 Art. II. Recovery.—A. Of Right.—Actions Involving Title.

— **Title vs. possession.** A claim of possession is not a "claim of title," and where the gist of the action is an injury to the possession, so that evidence of mere possession would enable plaintiff to maintain it, an allegation of ownership and possession, made in the complaint and denied in the answer, does not enlarge the issue.⁷³ For instance, in an action for trespass on land, where the metes and bounds of the premises claimed to be owned by plaintiff are set out in the complaint, and defendant's answer admits that plaintiff owns the premises thus described, but denies that the alleged trespass is upon such premises, so that the issue is one of location, depending on the accuracy of measurement, the case does not involve title, but only a question of possession.⁷⁴ Furthermore, where actual possession is enough to maintain the action, evidence as to title does not entitle plaintiff to costs.⁷⁵ Defendant cannot, however, claim that title was not involved where he forced plaintiff to prove his title by objecting to oral proof of possession.⁷⁶

— **Existence of easement as involving title.** The question of title is in issue where the existence of an easement is in question.⁷⁷

— **Defense of license as involving title.** The defense of license does not involve a question of title,⁷⁸ except where the validity of a license from third persons is questioned.⁷⁹

⁷³ *Rathbone v. McConnell*, 20 Barb. 311.

⁷⁴ *Helutz v. Dellinger*, 28 How. Pr. 29.

⁷⁵ *Judges of Oneida Common Pleas v. People*, 18 Wend. 79; *Muller v. Bayard*, 15 Abb. Pr. 449; *Burnet v. Kelly*, 10 How. Pr. 406.

⁷⁶ *Foster v. Romer*, 15 Wkly. Dig. 487.

⁷⁷ *Heaton v. Ferris*, 1 Johns. 146; *Eustace v. Tuthill*, 2 Johns. 185; *Jones v. Metropolitan El. R. Co.*, 59 Super. Ct. (27 J. & S.) 437, 14 N. Y. Supp. 627; *Bruen v. Manhattan R. Co.*, 20 Civ. Proc. R. (Browne) 127, 14 N. Y. Supp. 285. Defendant's denial of all knowledge or information sufficient to form a belief as to plaintiff's allegation of the ownership of the easement, interfered with by defendant's railway, causes "a claim of title to real property" to arise upon the pleadings. *Moore v. New York El. R. Co.*, 30 Abb. N. C. 306, 4 Misc. 132, 53 State Rep. 106, 23 N. Y. Supp. 863.

⁷⁸ *Wickham v. Seely*, 18 Wend. 643; *Rathbone v. McConnell*, 21 N. Y. 466; *Mechl v. Schwieckart*, 67 Barb. 599. Though the reply deny that

 Art. II. Recovery.—A. Of Right.—Actions Involving Title.

— **Admission of title at trial.** If defendant puts the title in issue, and compels plaintiff to prepare to prove it, plaintiff is entitled to costs, notwithstanding defendant admits title at the trial.⁸⁰

— **Particular actions.** Though the authorities are conflicting, the later cases hold that actions for partition are not within this section,⁸¹ but that actions for dower are.⁸² A creditor's action to set aside a fraudulent conveyance is not within this section, though it involves the title to real property, since not "triable by a jury."⁸³ An action to abate a nuisance does not carry costs as of course,⁸⁴ though an action to recover damages therefor may involve title where the possession and ownership of land is alleged and denied.⁸⁵ In an action by a lessee against his lessor for breach of the covenant for quiet enjoyment, where an eviction under a paramount title is alleged and denied, the question of title is involved.⁸⁶ The fact that the issue in ejectment involves only questions of boundary does not deprive the plaintiff, upon a recovery, of his right to costs.⁸⁷ But in an action to recover a portion of the expense of building a line fence where the dispute between the parties is not as to their division line but whether the fence

the person whose license is set up had any power to give a license, the case does not present a claim of title. *Launitz v. Barnum*, 6 Super. Ct. (4 Sandf.) 637.

⁷⁹ *Meehl v. Schwieckart*, 67 Barb. 599, 601.

⁸⁰ *Niles v. Lindsley*, 8 Super. Ct. (1 Duer) 610, 8 How. Pr. 131; *Dunckel v. Farley*, 1 How. Pr. 190.

⁸¹ *Weston v. Stoddard*, 22 Civ. Proc. R. (Browne) 51, 42 State Rep. 76, 16 N. Y. Supp. 605. Contra, *Davis v. Davis*, 3 State Rep. 163.

⁸² *Jones v. Emery*, 1 Civ. Proc. R. (McCarty) 338; *Everson v. McMullen*, 45 Hun, 578, 10 State Rep. 627. Contra, *Aikman v. Harsell*, 5 Civ. Proc. R. (Browne) 93.

⁸³ *Black v. O'Brien*, 23 Hun, 82. Contra, *Van Wyck v. Baker*, 11 Hun, 309.

⁸⁴ *Le Roy v. Browne*, 54 Hun, 584, 8 N. Y. Supp. 82; *Ross v. Dole*, 13 Johns. 306.

⁸⁵ *Quin v. Winter*, 22 Abb. N. C. 462, 4 N. Y. Supp. 865.

⁸⁶ *De Graff v. Hoyt*, 4 T. & C. 348.

⁸⁷ *Leprell v. Kleinschmidt*, 112 N. Y. 364.

in question was built upon it, the title to real property is not involved.⁸⁸

In trespass, if plaintiff must prove title, the title is in issue,⁸⁹ i. e., the title is in dispute where not only plaintiff's possession but also his right to possession is denied.⁹⁰ If plaintiff is not in actual possession, he must prove his title to show a constructive possession, and hence in such a case the question of title may arise on the pleadings.⁹¹ If plaintiff is in possession, title does not come in issue in trespass.⁹² If the complaint claims damages for injury to the freehold, however, and title in plaintiff is alleged and denied, the title is in issue.⁹³ In trespass for cutting down trees, a claim for treble damages, where denied in the answer, raises an issue as to title to the lands since only the owner of the land can claim treble damages.⁹⁴ Where a defendant pleads title which by statute is deemed denied by the plaintiff, a claim to real property arises on the pleadings.⁹⁵ It is immaterial that no evidence was offered on the trial on the question of title.⁹⁶ Merely pleading as a defense that defendant "thought" the property was a legal highway does not raise a question of title.⁹⁷

— **Certificate that question of title arose on the trial.** A certificate of the trial judge or referee showing that a question of title arose on the trial entitles the successful party to costs irrespective of whether a claim of title arose on the pleadings. The certificate is not required where the title

⁸⁸ *Collins v. Adams*, 15 Civ. Proc. R. (Browne) 384, 19 State Rep. 48, 4 N. Y. Supp. 217.

⁸⁹ *Boardway v. Scott*, 31 Hun. 378.

⁹⁰ *Powers v. Conroy*, 47 How. Pr. 84; *Kelly v. New York & M. B. R. Co.*, 84 N. Y. 233; *Green v. Trustees of Village of Canandaigua*, 30 Hun. 306; *Crowell v. Smith*, 35 Hun. 182.

⁹¹ *Niles v. Lindsley*, 8 How. Pr. 131; *Hubbell v. Rochester*, 8 Cow. 115.

⁹² *Squires v. Seward*, 16 How. Pr. 478.

⁹³ *Kelly v. New York & M. B. R. Co.*, 84 N. Y. 233; *Crowell v. Smith*, 35 Hun. 182, 185. See, also, *Taylor v. Wright*, 36 App. Div. 568, 55 App. Div. 761.

⁹⁴ *Crowell v. Smith*, 35 Hun. 182.

⁹⁵, ⁹⁶ *Farrell v. Hill*, 69 Hun. 455, 23 N. Y. Supp. 402.

⁹⁷ *Dexter v. Alfred*, 74 Hun. 259, 26 N. Y. Supp. 592.

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comes in question on the pleadings.⁹⁸ The certificate of the judge who tried the cause is the only evidence receivable as to whether title came in question at the trial.⁹⁹ but while it is conclusive on the taxing officer,¹⁰⁰ the court can review the grounds on which it was granted, and may vacate it, if granted on improper grounds.¹⁰¹ Inasmuch as the certificate may be set aside on a motion for that purpose, an appeal from the judgment does not bring up for review, by specifying in the notice of appeal, the question of the propriety of granting or refusing the certificate.¹⁰² The referee's certificate that title came in question, and was decided by him for defendants, is of no avail on the question of costs, where the court can see from the pleadings that it did not come in question.¹⁰³ That the certificate was made by the judge and not by the court must be raised before the taxing officer.¹⁰⁴ A certificate that title came in question on the trial as to a part of the issues does not entitle plaintiff to costs though he recovers nominal damages where the damages are awarded for a trespass on land not described in the complaint.¹⁰⁵

§ 2086. Action to recover a chattel.

Plaintiff is entitled to costs of course on the rendering of a final judgment in his favor "in an action to recover a chattel; but if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his

⁹⁸ *Kelly v. New York & M. B. R. Co.*, 1 Month. Law Bul. 43.

⁹⁹ *City of New York v. Hillsburgh*, 2 Code R. 152; *Niles v. Lindsley*, 8 Super. Ct. (1 Duer) 610, 8 How. Pr. 131; *Turner v. Van Riper*, 43 How. Pr. 33.

¹⁰⁰ *Cooley v. Cummings*, 17 Civ. Proc. R. (Browne) 145, 4 N. Y. Supp. 530; *Lillis v. O'Conner*, 8 Hun. 280, and cases cited.

¹⁰¹ *Barney v. Keith*, 6 Wend. 555; *Cooley v. Cummings*, 17 Civ. Proc. R. (Browne) 146, 4 N. Y. Supp. 530.

¹⁰² *Cooley v. Cummings*, 17 Civ. Proc. R. (Browne) 145, 4 N. Y. Supp. 530.

¹⁰³ *Squires v. Seward*, 16 How. Pr. 478.

¹⁰⁴ *Lillis v. O'Conner*, 8 Hun. 280.

¹⁰⁵ *Hill v. Edie*, 24 Wkly. Dig. 124.

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costs cannot exceed the amount of the value and the damages.¹⁰⁰ So reads the Code provision which constitutes the only authority for the allowance of costs in an action to recover a chattel. If the action, by the consent of plaintiff, takes the form of one for conversion, and the verdict and judgment entered are not such as required by the Code in actions for the recovery of a chattel, this Code section does not apply.¹⁰⁷

Where plaintiff sues for several articles, but, by reason of the taking being a single act, necessarily claims them in a single cause of action, he is entitled to costs if he succeeds as to any part of the articles, although defendant succeeds as to the residue upon a separate issue as to the title to the residue.¹⁰⁸ No injustice can result to a defendant by the rule adopted since by an offer of judgment he can always throw on the plaintiff the responsibility for costs incurred in prosecuting an unsuccessful litigation as to any article of property described in the complaint.¹⁰⁹

It will be noticed that full costs are recoverable only where the value of the chattels, "as fixed," together with the damages, amounts to fifty dollars or more. If less than fifty dollars is recovered, the costs can not exceed the recovery.¹¹⁰ The obvious design of this Code provision is to compel plaintiff, in bringing replevin in the supreme court, to make sure that he can establish value and damages to the extent of at least fifty dollars as a condition to a recovery of a full bill of costs.¹¹¹ It follows that if the judgment merely directs a re-

¹⁰⁰ Code Civ. Proc. § 3228, subd. 2.

¹⁰⁷ *McLain v. Mathabele*, Plano Mfg. Co., 54 App. Div. 126, 66 N. Y. Supp. 297.

¹⁰⁸ *Kilburn v. Lowe*, 57 Hun. 237. Approved in *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170. To same effect, *Mertens v. Fitzwater*, 53 Hun. 597, 6 N. Y. Supp. 797. Defendant is entitled to no costs. *Stoddard v. Clarke*, 9 Abb. Pr. (N. S.) 310.

¹⁰⁹ *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 170, 175.

¹¹⁰ *Wilkins v. Williams*, 15 Civ. Proc. R. (Browne) 168, 2 N. Y. Supp. 807, *Rapid Safety Filter Co. v. Wyckoff*, 20 Misc. 429, 45 N. Y. Supp. 1028. The term "costs" includes disbursements so that together they cannot exceed the verdict. *Ryan v. Farley*, 3 Month. Law Bul. 78.

¹¹¹ *Herman v. Girvin*, 8 App. Div. 418, 421, 40 N. Y. Supp. 845.

turn of the property without fixing its value, plaintiff is not entitled to any costs.¹¹² So if plaintiff has taken the property which has not been rebonded, and recovered a verdict for possession, he is not entitled to costs as of course, if its value has not been fixed by verdict, report, or decision, notwithstanding the fact that his testimony as to value is uncontradicted.¹¹³ And where an offer of judgment for certain property, with a specified amount of damages less than fifty dollars, is accepted, the costs cannot exceed the damages specified.¹¹⁴

§ 2087. Action of which a justice of the peace has not jurisdiction.

Plaintiff is entitled to costs of course, on the rendering of a final judgment in his favor, in an action where a justice of the peace has no jurisdiction as specified in section 2863 of the Code.¹¹⁵ The actions referred to will now be considered.

— **Actions where people of state are party.** Where the people of the state are a party, except for one or more fines or penalties not exceeding two hundred dollars, plaintiff recovers costs as of course where successful. If plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed the damages.¹¹⁶

— **Actions for torts and miscellaneous actions.** Where the action is to recover damages for an assault,¹¹⁷ battery, false im-

¹¹² *Lockwood v. Waldorf*, 91 Hun, 281, 36 N. Y. Supp. 199; *Rapid Safety Filter Co. v. Wyckoff*, 20 Misc. 429, 45 N. Y. Supp. 1028.

¹¹³ *Wolff v. Moses*, 26 Misc. 500, 57 N. Y. Supp. 696; *Herman v. Girvin*, 8 App. Div. 418, 40 N. Y. Supp. 815, which expressly overrules *Claffin v. Davidson*, 53 Super. Ct. (21 J. & S.) 122.

¹¹⁴ *Hausauer v. Machawiez*, 54 App. Div. 23, 66 N. Y. Supp. 340.

¹¹⁵ Code Civ. Proc. § 3228, subd. 3.

¹¹⁶ Code Civ. Proc. § 3228, subd. 3, as amended by Laws 1898, c. 110; *People v. Strauss*, 48 App. Div. 198, 62 N. Y. Supp. 812.

¹¹⁷ An action for personal injuries sustained through defendant's negligence is not an action for assault and battery. *Kaliski v. Pelham Park R. Co.*, 20 Civ. Proc. R. (Browne) 315, 15 N. Y. Supp. 519; *Ruger v. Fayhs Watch-Case Co.*, 20 Civ. Proc. R. (Browne) 204, 13 N. Y. Supp. 788; overruling *Garrabrant v. Sullivan*, 13 Civ. Proc. R. (Browne) 196.

prisonment, libel, slander, criminal conversation, seduction, or malicious prosecution, or where it is brought under sections 1837,¹¹⁸ 1843,¹¹⁹ 1868,¹²⁰ 1902,¹²¹ or 1969¹²² of the Code, plaintiff recovers costs as of course where successful. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution, the plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed the damages.¹²³ And the costs which cannot exceed the amount of recovery includes disbursements.

— Actions where accounts exceed four hundred dollars.

Where, in a matter of account, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds four hundred dollars, a justice has no jurisdiction, and plaintiff recovers costs as of course, where successful, without regard to the amount of recovery. The amount of plaintiff's "recovery" is immaterial¹²⁴ provided there were unliquidated accounts between the parties, the total amount of which exceeded four hundred dollars. Demands contested by the pleadings but admitted on the trial are demands "proved."¹²⁵

¹¹⁸ Action by creditor against next of kin to recover debt of decedent.

¹¹⁹ Action by creditor against heirs to recover debt of decedent.

¹²⁰ Action against legatee or devisee by subscribing witness to will or by child born after will.

¹²¹ Action for death by wrongful act.

¹²² Action for public funds converted, etc.

¹²³ Code Civ. Proc. § 3228, subd. 3. This limitation does not apply to an action to recover damages for causing death by negligence. *O'Connor v. Union R. Co.*, 35 Misc. 728, 68 N. Y. Supp. 1056; *Silberstein v. Wm. Wiebe Co.*, 29 Abb. N. C. 291, 22 N. Y. Supp. 170, 171; *Gorton v. United States & B. Mail S. S. Co.*, 20 Civ. Proc. R. (Browne) 202, 13 N. Y. Supp. 672. It does apply, however, to an action for alienation of affections. *Wilson v. McGroger*, 34 State Rep. 775, 20 Civ. Proc. R. (Browne) 36, 12 N. Y. Supp. 39.

¹²⁴ *Stilwell v. Staples*, 3 Abb. Pr. 365, 12 Super. Ct. (5 Duer) 691; *Glackin v. Zeller*, 52 Barb. 147; *Boston Mills v. Eull*, 6 Abb. Pr. (N. S.) 319, 31 Super. Ct. (1 Sweeny) 359, 37 How. Pr. 299.

¹²⁵ *Stilwell v. Staples*, 3 Abb. Pr. 365, 12 Super. Ct. (5 Duer) 691; *Lund v. Broadhead*, 41 How. Pr. 146; *Osborne v. Parker*, 66 App. Div. 277, 280, 72 N. Y. Supp. 894.

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So if defendant admits plaintiff's claim and interposes a counterclaim, but makes no offer of judgment, and plaintiff's claim exceeds four hundred dollars though his recovery is the difference between the counterclaim and his claim—less than four hundred dollars—the plaintiff is entitled to costs.¹²⁶ The accounts must be subsisting unliquidated accounts.¹²⁷ Undisputed payments made on a contract extinguish the debt pro tanto and do not constitute "matters of account."¹²⁸ Each party must have a claim against the other on which he might sue.¹²⁹ The word "accounts," as used herein, relates to demands and is not restricted to running accounts.¹³⁰ Counterclaims are included;¹³¹ but credits are not counterclaims.¹³² An erroneous settlement of accounts is not such a liquidation as gives a justice of the peace jurisdiction where the accounts exceed \$400. Where, in an action brought in a court of record for the balance of such accounts, they are re-examined, and the errors corrected, the plaintiff, though he recovers less than \$50, is entitled to costs.¹³³

It is not necessary that the action should have been commenced in a justice's court and have been there discontinued by reason of want of jurisdiction to entitle the plaintiff to costs;¹³⁴ but where the action is originally brought in the su-

¹²⁶ *Friedman v. Eisenberg*, 24 State Rep. 298, 4 N. Y. Supp. 551.

¹²⁷ *Abernathy v. Abernathy*, 2 Cow. 413.

¹²⁸ *Mander v. Bell*, 4 Wkly. Dig. 519; *Steele v. Macdonald*, 4 Civ. Proc. R. (Browne) 227; *Bundick v. Hale*, 4 Civ. Proc. R. (Browne) 311; following *Lamoure v. Caryl*, 4 Denio, 370, 372.

¹²⁹ *Brady v. Durbrow*, 2 E. D. Smith, 78.

¹³⁰ *Underhill v. Rushmore*, 51 App. Div. 204, 64 N. Y. Supp. 1015; following *Glackin v. Zeller*, 52 Barb. 147, and *Crim v. Cronkhite*, 15 How. Pr. 250.

¹³¹ *Sherry v. Cary*, 111 N. Y. 514; *Griffen v. Brown*, 53 Barb. 428; *Hayes v. O'Reilly*, 8 Civ. Proc. R. (Browne) 347, note; *Lablache v. Kirkpatrick*, 8 Civ. Proc. R. (Browne) 340, 3 How. Pr. (N. S.) 61; *Lund v. Broadhead*, 41 How. Pr. 146.

¹³² *Walp v. Boyd*, 19 State Rep. 111, 2 N. Y. Supp. 735; *Gregory v. McArdle*, 1 How. Pr. (N. S.) 187.

¹³³ *Gilliland v. Campbell*, 18 How. Pr. 177.

¹³⁴ *Youker v. Johnson*, 62 App. Div. 584, 585, 71 N. Y. Supp. 178, and cases cited.

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preme court and the plaintiff's recovery is less than fifty dollars, he must show by proof that the sum total of the accounts "proved" exceeds four hundred dollars, it not being sufficient that the sum total of the sums "claimed" or "contested" exceeds that sum.¹³⁵ When the action is tried before the court or a referee, the question is determined by the facts found, and when tried before a jury by the sum total of the accounts shown to have been "proved to their satisfaction."¹³⁶ If the trial is by jury, proof may be, it seems, by affidavits of plaintiff's attorney and abstracts from the stenographer's minutes of the trial.¹³⁷

If defendant procures a dismissal on this ground in a justice's court, he is estopped from questioning the want of jurisdiction, in answer to plaintiff's claim for costs.¹³⁸

— **Actions against an executor or administrator.** Where the action is brought against an executor or administrator, as such, and the claim has been duly presented to the executor or administrator and rejected by him, plaintiff recovers costs of course where successful except where the amount of the claim is less than fifty dollars.¹³⁹ This provision must be read in connection with sections 1835 and 1836 of the Code which are treated of hereafter.¹⁴⁰ Suffice it to say in this connection that if the "claim" is for less than fifty dollars, defendant re-

¹³⁵ *Youker v. Johnson*, 62 App. Div. 584, 585, 71 N. Y. Supp. 178; *Tompkins v. Greené*, 21 Hun, 257; *Sherry v. Cary*, 111 N. Y. 517; *Kemp v. Union Gas & Oil Stove Co.*, 22 Civ. Proc. R. (Browne) 190, 19 N. Y. Supp. 959.

¹³⁶ Finding of court or referee is conclusive on the parties. *Youker v. Johnson*, 62 App. Div. 584, 71 N. Y. Supp. 178; *Fuller v. Conde*, 47 N. Y. 89. In *Sherry v. Cary*, 111 N. Y. 514, the jury rendered a verdict for about twenty dollars but also specifically found the amount of the accounts of both parties which exceeded \$400.

¹³⁷ *Sherry v. Cary*, 111 N. Y. 514.

¹³⁸ *Bradner v. Howard*, 75 N. Y. 417; *Glackin v. Zeller*, 52 Barb. 147; *Bailey v. Stone*, 41 How. Pr. 346; *Kirk v. Blashfield*, 6 T. & C. 599.

¹³⁹ Code, § 2863, subd. 5, as amended by Laws 1895, c. 527.

¹⁴⁰ See post, § 2109.

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covers costs,¹⁴¹ since the amount of the claim, and not the recovery, governs.¹⁴²

§ 2088. Actions to recover money only.

Plaintiff is entitled to costs of course on recovering a final judgment in an action, other than one of those already specified in this article, in which the complaint demands judgment for a sum of money only, provided plaintiff recovers fifty dollars or more.¹⁴³ This Code section applies not only to actions commenced in a court of record but also to actions originating in a justice's court which have been tried *de novo* in the county court.¹⁴⁴ It applies where the complaint demands judgment for a sum of money only, irrespective of whether the action is one cognizable by a court of law or by a court of equity.¹⁴⁵ It does not apply, however, where the plaintiff has been permitted to sue in forma pauperis.¹⁴⁶ The amount of the recovery and not the amount demanded in the complaint is the criterion.¹⁴⁷ For instance, where, after action brought in the supreme court, and before answer, plaintiff accepts a payment on account of the amount due, so that the balance for which he recovers judg-

¹⁴¹ In such case, the action should be brought in a justice's court. *Lamphere v. Lamphere*, 54 App. Div. 17, 66 N. Y. Supp. 270.

¹⁴² *German-American Provision Co. v. Garrone*, 73 App. Div. 409, 77 N. Y. Supp. 134. Defendant is not entitled to costs where he interposes a counterclaim which reduces the recovery to less than fifty dollars. *Osborne v. Parker*, 66 App. Div. 277, 72 N. Y. Supp. 894.

¹⁴³ Code Civ. Proc. § 3228, subd. 4.

¹⁴⁴ *Fowler v. Dearing*, 6 App. Div. 221, 39 N. Y. Supp. 1034.

¹⁴⁵ *Norton v. Fancher*, 92 Hun. 463, 36 N. Y. Supp. 1032; following *Murtha v. Curley*, 92 N. Y. 359.

¹⁴⁶ *Weltman v. Posenecker*, 19 Misc. 592, 44 N. Y. Supp. 406.

¹⁴⁷ *Pinder v. Stoothoff*, 7 Abb. Pr. (N. S.) 433; *Turner v. Van Riper*, 43 How. Pr. 33; *Lultgor v. Walters*, 64 Barb. 417. Plaintiff is not entitled to costs where his recovery is less than fifty dollars, even though his demand exceeded that amount, and was reduced by payments, made before trial, which were set up by supplemental answer. *Bates v. Norris*, 55 Super. Ct. (23 J. & S.) 269, 13 State Rep. 302, 13 Civ. Proc. R. (Browne) 395, 28 Wkly. Dig. 186; *Burke v. Philipps*, 20 Misc. 413, 45 N. Y. Supp. 1024.

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ment is less than \$50, he is not entitled to costs.¹⁴⁸ In computing the amount of recovery, interest is included,¹⁴⁹ and where the damages are trebled, the right to costs depends on the recovery of the increased amount.¹⁵⁰ Plaintiff is not deprived of his right to costs by the fact that the several liability of each of defendants is less than fifty dollars where the joint liability is in excess thereof.¹⁵¹ If the amount recovered is less than fifty dollars, then defendant is entitled to costs¹⁵² if there is no counterclaim.¹⁵³

A creditor's action to reach certain property and its proceeds, and failing to find them, to compel the parties who had applied them to their own use to pay them to a receiver, is not an action "for the recovery of money,"¹⁵⁴ nor is an action of foreclosure in which a deficiency judgment is demanded against a guarantor of the payment of the mortgage;¹⁵⁵ but an action for a penalty is an action for the recovery of money only,¹⁵⁶ as is an action brought to enforce a lien, in which plaintiff claims, not possession of the property subject to the lien, but judgment for the amount of the debt.¹⁵⁷

When the plaintiff fails to obtain a judgment sufficient in amount to entitle him to costs, which in consequence are awarded to the defendant, and on appeal such judgment is reversed, and a new trial ordered, which new trial results in a judgment in plaintiff's favor for an amount establishing his

¹⁴⁸ *Rice v. Gibbs*, 28 Hun, 202.

¹⁴⁹ *Loring v. Morrison*, 25 App. Div. 139, 48 N. Y. Supp. 975.

¹⁵⁰ *Kelny v. Ingraham*, 66 Barb. 259.

¹⁵¹ *Hoff v. Jewett*, 20 Misc. 35, 44 N. Y. Supp. 311.

¹⁵² *Lewis v. New York Dry Dock Co.*, 1 N. Y. Leg. Obs. 200. The defendant, in an action for breach of promise to marry, is entitled to a full bill of costs, where plaintiff recovers less than fifty dollars. *Selitz v. Borg*, 2 City Ct. R. 254.

¹⁵³ *Landfesterger v. Magnetic Tel. Co.*, 8 Abb. Pr. 35.

¹⁵⁴ *Buchanan v. Morrell*, 13 How. Pr. 296, 13 Shper. Ct. (6 Duer) 658.

¹⁵⁵ *Newcomb v. Hale*, 12 Abb. N. C. 338, 64 How. Pr. 490, 4 Civ. Proc. R. (Browne) 25.

¹⁵⁶ *People v. New York Cent. R. Co.*, 28 Barb. 284; *Avery v. Hyde*, 5 Wkly. Rep. 432.

¹⁵⁷ *Trust v. Person*, 3 Abb. Pr. 84.

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right to costs, he is entitled to all the costs of the action as well of the first trial as of the appeal and the new trial.¹³⁸

§ 2089. **Actions in New York and Kings counties which could have been brought in minor courts.**

In order to relieve the higher courts of the counties of New York and Kings from the trial of minor causes which could have been brought in lower courts, the following clause was added as subdivision five of section 3228 of the Code by chapter 557 of the laws of 1904: "5. In all actions hereafter brought in the supreme court, triable in the county of New York or the county of Kings, which could have been brought, except for the amount claimed therein, in the city court of New York or the county court of Kings, and in which the defendant shall have been personally served with process within the counties of New York or Kings, plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more; and in all actions in the New York city court or Kings county court which could have been brought, except for the amount claimed therein, in the municipal court, and in which defendant shall have been personally served with process within New York city, plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more. The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under section 3229."

§ 2090. **Where several actions brought for the same cause.**

Where two or more actions are brought, in a case specified in section 454 of the Code, or otherwise for the same cause of action, against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered, upon the final judgment, by the plaintiff, in more than one action, which shall be at his election. But this prohibition does not apply to a case where the plaintiff joins as defendants, in each action brought, all the persons liable, not

¹³⁸ *Carpenter v. Manhattan L. Assur. Co.*, 25 Hun, 194.

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previously sued, who can, with reasonable diligence, be found within the state; or, if the action is brought in the city court of the city of New York, or a county court, within the city or county, as the case may be, where the court is located.¹⁵⁹

This Code section embraces, *inter alia*, actions for wrongs.¹⁶⁰ Section 454 permits the joining in one action of the parties severally liable on the same written instrument, including the parties to a bill of exchange or a promissory note. Where a consolidation of actions is ordered, the successful party will only be entitled to the costs and disbursements of the consolidated action from the time of consolidation, unless the order consolidating the actions reserves the right to tax the costs of the discontinued actions.¹⁶¹

This Code provision does not preclude the taxing of costs in each of the two actions where an action has been severed into two by the act of the court, without fault of the plaintiff;¹⁶² but where an action has been severed against some of the defendants because of their default, and subsequently the default of such defendants is opened and they are allowed to defend, the plaintiff, on entering final judgment in both actions, can recover but one bill of costs.¹⁶³ This provision does not apply to costs on appeal.¹⁶⁴

§ 2091. Where two or more causes of action are joined.

In an action specified in section 3228 of the Code, "wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon

¹⁵⁹ Code Civ. Proc. § 3226; *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. Supp. 80.

¹⁶⁰ *Quin v. Bowe*, 10 Daly 595.

¹⁶¹ *Hiscox v. New Yorker Staats Zeitung*, 50 Abb. N. C. 131, 3 Misc. 110, 52 State Rep. 212, 23 Civ. Proc. R. (Browne) 87, 23 N. Y. Supp. 682; *Blake v. Michigan Southern & N. I. R. Co.*, 17 How. Pr. 228; *Halley v. McCallum*, 2 City Ct. R. 335. Compare *Hildebrand v. Crawford*, 6 Larr. 502.

¹⁶² *Abbott v. Johnstown, G. & K. Horse R. Co.*, 24 Hun. 135.

¹⁶³ *Levin v. Haas*, 25 Hun. 266.

¹⁶⁴ *Pratt v. Allen*, 15 How. Pr. 450, 456.

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the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue, in which case, the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or offsetting them against, the sum awarded to the prevailing party, or otherwise, as the case requires. But this section does not entitle a plaintiff to costs, in a case specified in subdivision four of section 3228, where he is not entitled to costs, as prescribed in that subdivision, because his judgment is for less than fifty dollars.¹⁶⁶ This Code section does not apply where the complaint sets forth several causes of action as a single cause of action.¹⁶⁷

—What constitutes a "recovery" by defendant. A defendant does not so "recover" as to one cause of action as to entitle him to costs unless an affirmative judgment is rendered in his favor.¹⁶⁸ Nothing short of a specific verdict in his favor as to such cause of action will suffice.¹⁶⁹ Defendant must obtain an affirmative verdict or finding which would bar a new action based on such cause of action.¹⁷⁰ A defendant is not entitled to costs by merely defeating by nonsuit some of the causes of action sued on,¹⁷¹ nor by reason of the dismissal of some counts in the complaint by the trial court on the ground that they do not state a cause of action;¹⁷² nor by the dismissal of causes of action at the trial, on a defense not pleaded, but

¹⁶⁶ Code Civ. Proc. § 3234.

¹⁶⁷ *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 179, overruling *Ackerman v. De Lude*, 36 Hun. 44; *Coon v. Diendorf*, 8 Civ. Proc. R. (Browne) 293.

¹⁶⁸ *Quinby v. Claffin*, 39 State Rep. 792, 60 Hun. 585, 15 N. Y. Supp. 508; *Reilly v. Lee*, 33 App. Div. 261, 53 N. Y. Supp. 336; *Dougherty v. Metropolitan L. Ins. Co.*, 3 App. Div. 313, 73 State Rep. 739, 35 N. Y. Supp. 258.

¹⁶⁹ *Heath v. Forbes*, 18 Civ. Proc. R. (Browne) 297, 11 N. Y. Supp. 87.

¹⁷⁰ *Welling v. Ivoroyd Mfg. Co.*, 15 App. Div. 116, 44 N. Y. Supp. 374; *Burns v. Delaware, L. & W. R. Co.*, 63 Hun. 19, 17 N. Y. Supp. 415.

¹⁷¹ *Burns v. Delaware, L. & W. R. Co.*, 125 N. Y. 268; *McCarthy v. Innis*, 61 Hun. 354, 15 N. Y. Supp. 855; *Reilly v. Lee*, 33 App. Div. 261, 53 N. Y. Supp. 336.

¹⁷² *Crosley v. Cobb*, 42 Hun. 166.

ART. II. Recovery — A. Of Right. — Where Causes of Action Joined.

arising incidentally upon the evidence, when the only issue was the same as to both causes of action, and plaintiff succeeds on that issue as to one count.¹⁷² But a verdict directed for defendant on one of the causes of action is a "recovery."¹⁷³ It has also been held that a finding of a referee that "judgment should be entered for the defendant on the second cause of action set forth in the complaint" on the ground that "the contract or contracts with the defendant on which the said cause of action is based were invalid" is a "recovery."¹⁷⁴ It has been held that defendant recovers on one cause of action where the court strikes it out as barred by the statute of limitations,¹⁷⁵ but this case is of doubtful authority in the light of later cases.

— When "substantial cause of action" is the same. It has been held that a certificate "that the substantial cause of action was the same on each issue" will not be granted unless a judgment on the one cause of action, if separately brought, would be a bar to an action on the other cause of action;¹⁷⁶ and that the fact that the same legal questions arise under both causes of action is not conclusive that the causes of action are substantially the same.¹⁷⁷ The "substantial cause of action" is not the same where the one is to recover damages for the breach of a contract made long after every fact set up in the first cause of action had occurred and where the relief sought was entirely different.¹⁷⁸ It has been held that "the substantial cause of action was the same on each issue" where the complaint contained a cause of action for services prior to a certain date and one for services after said date,¹⁷⁹ and also

¹⁷² Willard v. Strathan, 3 Civ. Proc. R. (Browne) 452.

¹⁷³ Browning v. New York, L. E. & W. R. Co., 64 Hun, 513, 46 State Rep. 565, 22 Civ. Proc. R. (Browne) 193, 19 N. Y. Supp. 453.

¹⁷⁴ Walling v. Iveroyd Mfg. Co., 15 App. Div. 116, 44 N. Y. Supp. 371. Contra, Momburger v. Kaufman, 7 App. Div. 389, 40 N. Y. Supp. 213.

¹⁷⁵ Blashfield v. Blashfield, 41 Hun, 249.

¹⁷⁶ Teator v. New York Mut. Sav. & Loan Ass'n, 32 Misc. 542, 67 N. Y. Supp. 10.

¹⁷⁷ Teator v. New York Mut. Sav. & Loan Ass'n, 32 Misc. 542, 67 N. Y. Supp. 15.

¹⁷⁸ Cook v. Casher, 87 App. Div. 8, 12, 83 N. Y. Supp. 1045.

¹⁷⁹ Barlow v. Barlow, 35 Hun, 59.

where the complaint charges conversion of two distinct parcels of property as separate causes of action.¹⁸⁰

§ 2092. After discontinuance in justice's court on plea of title.

"Where an action, brought before a justice of the peace, or in a district court of the city of New York, or a justices' court of a city, has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question, and a new action, for the same cause, has been commenced in the proper court, the party in whose favor final judgment is rendered in the new action is entitled to costs, except that, where final judgment is rendered thereby, in favor of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified that the title to real property came in question on the trial."¹⁸¹

This Code section is substantially the same as the provision of the old Code. It includes the case of a trial by the court or a referee as well as that of a trial by a jury.¹⁸² This Code section applies though defendant, instead of answering in the supreme court, demurs and suffers judgment.¹⁸³ Where plaintiff recovers in the supreme court upon the same pleadings, damages to an amount less than \$50 for trespasses committed exclusively upon the portion of the premises not covered by the plea of title, the defendant instead of plaintiff is entitled to the costs.¹⁸⁴

The troublesome part of this Code provision is the exception. Note that "the party in whose favor final judgment is rendered" is entitled to costs except that where final judgment is rendered in favor of defendant on the trial of an "issue of fact" defendant is not entitled to costs unless he obtains a certificate that the title to real property came in issue on the

¹⁸⁰ *Reed v. Batten*, 22 Abb. N. C. 63, 17 Civ. Proc. R. (Browne) 272, 6 N. Y. Supp. 708.

¹⁸¹ Code Civ. Proc. § 3235.

¹⁸² *Gates v. Canfield*, 28 Hun, 12.

¹⁸³ *Locklin v. Casler*, 50 How. Pr. 43.

¹⁸⁴ *Shull v. Green*, 49 Barb. 311; *Morss v. Salisbury*, 48 N. Y. 636, 647; *Shufelt v. Sweet*, 15 Wkly. Dig. 1; *Falkel v. Moore*, 32 Hun, 293.

 Art. II. Recovery.—B. Discretionary.—1. Costs of Action.

trial.¹²⁰ Now there is a comparatively late decision which holds correctly but the reasoning of which seems to be wrong. That case is *Taylor v. Wright*, 36 App. Div. 569, which holds that where defendant procures a dismissal of the complaint in the supreme court because of plaintiff's failure to prove the facts necessary to support the complaint, the defendant is entitled to costs "on obtaining a certificate." It is submitted that defendant is entitled to costs in such a case but that the Code exception does not apply because there was no trial of an issue "of fact" and hence a certificate is unnecessary. This is in accordance with earlier cases which hold that there is no trial of an "issue of fact" where the complaint is dismissed for want of evidence to support it,¹²¹ or because of the failure of plaintiff to appear,¹²² though there is such a trial when the court directs a verdict.¹²³

(B) WHERE DISCRETIONARY.

(1) COSTS OF ACTION.

§ 2093. Actions for equitable relief.

Section 3330 of the Code provides that "except as provided in the last two sections, the court may, on the rendering of a final judgment, in its discretion, award costs to any party in such sum not exceeding the total amount authorized by statute as to the court shall seem just." In short, in actions for equitable, as distinguished from legal, relief, costs are discretionary.¹²⁴ But while the awarding of costs in cases in equity is said to rest in the sound discretion of the court, this does not mean that such discretion may be exercised arbitri-

¹²⁰ So held where plaintiff failed entirely as to one defendant and failed as to one count of action against the other defendant. *Blake v. Janon*, 10 Hun. Pr. 523.

¹²¹ *Gates v. Canfield*, 28 Hun. 12.

¹²² *Sanders v. Goldthrite*, 41 Hun. 242.

¹²³ *Collins v. Adams*, 15 Civ. Proc. R. (Browne) 284, 19 State Rep. 48, 4 N. Y. Supp. 217.

¹²⁴ *Eastern v. Kirk*, 2 Johns. Ch. 317; *Herrington v. Robertson*, 71 N. Y. 289; *Dill v. Wiener*, 88 N. Y. 153; *Husted v. Van Ness*, 1 App. Div. 129, 36 N. Y. Supp. 1943.

ART. II. Recovery—B. Discretionary—1. Costs of Action.

rily or capriciously,¹⁹⁰ or that the decision of the court will not be subject to revision on appeal, although in practice its action is seldom revised except on a clear showing of abuse.¹⁹¹ The statement simply means that the disposition of costs is not, as in cases at law, predetermined by fixed rules but in every case the court will take into consideration all the circumstances and grant costs as justice seems to dictate.¹⁹² The awarding of costs in equity cases is governed by the same rules which existed before the Codes.¹⁹³

These rules apply, *inter alia*, to an action of interpleader,¹⁹⁴ action to foreclose a mortgage,¹⁹⁵ action for the admeasurement of dower,¹⁹⁶ action for partition,¹⁹⁷ action to charge the estate of deceased partners with a partnership debt, on allegations of the insolvency of the survivor,¹⁹⁸ and an action to recover damages for a nuisance, and an injunction against its continuance, although damages only are actually recovered, and an injunction is denied.¹⁹⁹ So the Code provides that costs are discretionary in a suit to enforce a mechanic's lien,²⁰⁰ and in divorce cases.²⁰¹

¹⁹⁰ *Law v. McDonald*, 9 Hun, 23, 26.

¹⁹¹ *Mercantile Safe Deposit Co. v. Dimon*, 55 App. Div. 538, 542, 67 N. Y. Supp. 430; *Law v. McDonald*, 9 Hun, 23, 27; *Couch v. Millard*, 41 Hun, 212, 214, and cases cited, 5 Enc. Pl. & Pr. 184.

¹⁹² 5 Enc. Pl. & Pr. 185.

¹⁹³ *Law v. McDonald*, 9 Hun, 23, 26, and cases cited.

¹⁹⁴ *Mercantile Safe Deposit Co. v. Dimon*, 55 App. Div. 538, 543, 67 N. Y. Supp. 430. Where an order of interpleader is obtained and the parties in interest brought in, the action becomes an equitable one, and costs are in the discretion of the court. *Wimpecker v. Mutual L. Ins. Co.*, 12 App. Div. 73, 77 State Rep. 258, 43 N. Y. Supp. 358.

¹⁹⁵ *Morris v. Wheeler*, 45 N. Y. 708; *Lowrey v. Ellis*, 13 Hun, 697. Strict foreclosure. *O'Hara v. Brophy*, 24 How. Pr. 379.

¹⁹⁶ *Aikman v. Harsell*, 31 Hun, 634. Contra *Everson v. McMillen*, 45 Hun, 578.

¹⁹⁷ See *ante*, p. 2910.

¹⁹⁸ *Van Riper v. Poppenhausen*, 47 N. Y. 68; *Yorks v. Peck*, 9 How. Pr. 201.

¹⁹⁹ *Davis v. Lambertson*, 56 Barb. 480.

²⁰⁰ Code Civ. Proc. § 3411.

²⁰¹ Code Civ. Proc. § 1769.

 Art. II. Recovery. B. Discretionary. — 1. Costs of Action.

The general rule is that the party succeeding on the merits is entitled to costs,²² unless special and strong reasons to the contrary prevent.²³ The successful party, though he may be denied costs, never pays them. And one who unwarrantably resists another's right will be compelled to pay the costs, although otherwise such other would have been compelled to pay them.²⁴ So one who would ordinarily be given costs will be required to pay his own costs where he has behaved inequitably or improperly.²⁵ Thus, defendant vendee, though successful, is not entitled to costs in an action for specific performance where, though the title proved defective, it appeared that the vendee was neither ready nor willing, at the time appointed for closing the contract, to perform it, and the defect in the title neither was, nor was stated to be, the cause of his refusal.²⁶ So plaintiff, though successful, should not recover costs where defendant in his answer offered plaintiff the relief which was ultimately awarded to him.²⁷ Even if plaintiff is unsuccessful, costs will not be imposed on him, where he was led into suing by suspicious conduct of the defendant.²⁸ So where upon an action for an accounting, necessarily brought to wind up the trust, it appeared that a small balance was due the defendant trustees from plaintiff, costs were improperly allowed against the plaintiff.²⁹ So where both parties, equally innocent, are endeavoring to avoid a loss caused by a third person, no costs will be awarded to either, as against the other.³⁰ So where both parties have, in some degree, been in the wrong, each party should bear his own

²² *Gart v. Brady*, 1 Barb. Ch. 157.

²³ *Couch v. Millard*, 41 Barb. 312; *Hend v. Norton*, Hoff. Ch. 314.

²⁴ *Naylor v. Calver*, 20 App. Div. 181, 47 N. Y. Supp. 267; *Pratt v. Super*, 47 How. Pr. 233, 9 Abb. Pr. 150.

²⁵ *Vroom v. Dumas*, 4 Barb. 336.

²⁶ *Nichols v. Kellet*, 6 App. Div. 216, 41 N. Y. Supp. 172. See, also, *Kapoor v. Arnold*, 16 State Rep. 117, 1 N. Y. Supp. 412.

²⁷ *Blackford v. Searles*, 9 App. Div. 158, 41 N. Y. Supp. 148.

²⁸ *Matthews v. Poutney*, 15 Barb. 127; *Price v. Major*, 28 State Rep. 18, 1 N. Y. Supp. 747.

²⁹ *Gartley v. Owens*, 35 State Rep. 152, 12 N. Y. Supp. 319.

³⁰ *Pendleton v. Eaton*, 3 Johns. Ch. 69.

costs of the suit generally.²¹¹ If the judgment continues the action to enable plaintiff to pursue his legal remedy for damages, it cannot award costs to plaintiff.²¹² A defendant who is properly charged with costs as a wrongdoer cannot object that a co-defendant was not charged with costs since there is no contribution among wrongdoers.²¹³

— **Where action is dismissed.** A dismissal, where made necessary by events occurring after the commencement of the action, should be without costs.²¹⁴ So in a case of mutual error, e. g., where a plaintiff had probable cause for seeking the aid of the court, but failed to establish his title, but the defendant showed none, or no better title, the dismissal should be without costs to either.²¹⁵ Costs may be allowed defendant on dismissal on the death of the sole plaintiff.²¹⁶

— **Where action is unnecessary.** If two or more suits in equity are brought and the plaintiff could have obtained all the relief sought in the one action, costs of only one action will be allowed.²¹⁷

— **Novel questions involved.** Where the question passed on is a novel one, it seems that costs will not be granted to the prevailing party.²¹⁸

²¹¹ *Brown v. Rickets*, 4 Johns. Ch. 303; *Scott v. Throp*, 4 Edw. Ch. 1; *Spencer v. Spencer*, 11 Paige, 299; *Beacham's Assignees v. Eckford's Ex'rs*, 2 Sandf. Ch. 127; *Ten Eyck v. Holmes*, 3 Sandf. Ch. 128; *Righter v. Stall*, 3 Sandf. Ch. 608.

²¹² *Fitzpatrick v. Dorland*, 27 Hun, 291.

²¹³ *Holden v. New York & E. Bank*, 72 N. Y. 286, 299.

²¹⁴ *Trustees of Columbia College v. Thacher*, 87 N. Y. 311.

²¹⁵ *Nicoll v. Town of Huntington*, 1 Johns. Ch. 166.

²¹⁶ *Banta v. Marcellus*, 2 Barb. 373.

²¹⁷ *Munro v. Tousey*, 36 State Rep. 522, 13 N. Y. Supp. 81. So held in foreclosure suits. *Wendell v. Wendell*, 3 Paige, 509; *Newman v. Ogden*, 6 Ch. Sent. 40; *Peck v. Cohen*, 10 Super. Ct. (8 J. & S.) 112. Where a prior mortgagee made a party to an action for the foreclosure of a junior mortgage in order to ascertain and pay off the amount of the prior mortgage brings another action for the foreclosure thereof, the question whether he shall be allowed in addition to his principal and interest the costs and disbursements of the second action is in the discretion of the court at special term. *Guilford v. Jacobie*, 69 Hun, 420, 52 State Rep. 837, 23 N. Y. Supp. 462.

²¹⁸ *Alward v. Alward*, 15 Civ. Proc. R. (Browne) 151, 17 State Rep.

 Art. II. Recovery.—B. Discretionary.—1. Costs of Action.

—Where each party succeeds in part. Where in an equity action each party succeeds in part, costs should not be awarded to either.²¹⁹ But this rule is applied only where some distinct and independent claim of plaintiff has wholly failed, or where he was at fault, as by having produced a mistake in fact which occasioned the litigation.²²⁰ And where, in an action to foreclose a mechanic's lien, the referee reported against plaintiff on its principal claim for materials furnished and in its favor for extras, plaintiff sustained a substantial defeat so as to make it proper to require him to pay the costs of the action.²²¹ So costs may be allowed to defendants in foreclosure who are successful in defeating a judgment for a deficiency or in re-

804, 2 N. Y. Supp. 42, *Ives v. Miller*, 19 Barb. 196, *Nelson v. McDonald*, 61 Hun, 196, 16 N. Y. Supp. 273.

²¹⁹ *Crippen v. Hermann*, 9 Paige, 211; *Law v. McDonald*, 9 Hun, 23; *Corn v. Millard*, 41 Hun, 212, 1 State Rep. 167; *West v. City of Utica*, 71 Hun, 449, 24 N. Y. Supp. 1973; *Cross v. Smith*, 85 Hun, 49, 66 State Rep. 25, 32 N. Y. Supp. 671; *Barker v. Laney*, 1 App. Div. 352, 358, 49 N. Y. Supp. 66; *Tucker v. City of Utica*, 35 App. Div. 173, 177, 54 N. Y. Supp. 866. The costs in an action of interpleader, where each party has succeeded in establishing title to a substantial part of the fund in dispute, are not within Code Civ. Proc. §§ 3228, 3229, but come under section 3230 which leaves them in the discretion of the court. *Cronin v. Cronin*, 3 How. Pr. (N. S.) 144, 9 Civ. Proc. R. (Browne) 127.

²²⁰ But where he makes but one claim and establishes it, except as to a small part which is cut off by the statute of limitations (a defense he is not entitled to anticipate and concede at the commencement of the action), the court may in their discretion award costs to him, if defendants, on setting up the statute, did not tender or offer judgment for the amount actually remaining due. *Kimble v. Allison*, 34 N. Y. 180. So in an action to open and set aside an account stated, and for an accounting as to the whole period of the business dealings of the parties, where plaintiff fails in setting aside the account, but is found entitled to an accounting as to transactions subsequent thereto, and to judgment for a certain sum, and it does not appear that before the trial defendants offered to allow judgment to be taken for that amount, in the exercise of a sound discretion, costs should be awarded to plaintiff. *Rutty v. Person*, 52 Super. Ct. (29 J. & S.) 329. See 6 Civ. Proc. R. (Browne) 25.

²²¹ *Atlas Iron Const. Co. v. Ferguson*, 71 Hun, 637, 26 N. Y. Supp. 1119.

during the amount claimed to be due on the mortgage.²²² Where both parties were in the wrong in that plaintiff claimed too much and defendant denied any liability, costs will not be awarded either party.²²³

Where, in an equity action, the substantial matters of controversy have arisen upon a counterclaim interposed by defendant upon which he has largely succeeded, costs should not be awarded against him.²²⁴ So where, in an equity action, plaintiff has offered no proof in support of his cause of action, but has confined himself to a successful defense of a counterclaim set up in the answer, an award of costs to the defendant is improper.²²⁵

Where party unreasonably defends. Both by Code provision²²⁶ and independent thereof,²²⁷ a defendant who unreasonably defends an action may be charged with the costs. Where persons are made parties to an equitable action in which they have no pecuniary interest, but simply in order that a complete determination and settlement of the questions involved may be had and the plaintiff receive the full benefit and enjoyment of property sought to be recovered, relieved from any obstacles which they might oppose thereto, their appearance in such action is purely voluntary, and they cannot under such circumstances become entitled as to costs against plaintiff, the only effect of their appearance being to subject them to costs in the discretion of the court if it should finally determine that they have unnecessarily defended.²²⁸

²²² *Bockes v. Hathorn*, 17 Hun, 87.

²²³ *Righter v. Stall*, 3 Sandf. Ch. 608; *Valk v. McKelge*, 43 State Rep. 26, 16 N. Y. Supp. 741.

²²⁴ *New York, L. E. & W. R. Co. v. Carhart*, 1 State Rep. 426.

²²⁵ *McCulloch v. Vibbard*, 14 Civ. Proc. R. (Brown) 388, 1 N. Y. Supp. 610.

²²⁶ Code Civ. Proc. § 423. Form of notice of no personal claim against defendant, see vol. 1, p. 739. See, also, *Barker v. Burton*, 67 Barb. 458; *First Nat. Bank of Canton v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117.

²²⁷ *O'Hara v. Brophy*, 24 How. Pr. 379; *First Nat. Bank of Canton v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117.

²²⁸ *King v. Barnes*, 109 N. Y. 269. To same effect, see *Walton v. Meeks*, 41 Hun, 311.

ART II. Recovery.—B. Discretionary.—1. Costs of Action.

One indifferent between the real contending parties, who is willing to pay to whomsoever should be declared entitled and who creates no costs by his own act or defense, is not liable for costs,²²² but should be allowed costs as against the unsuccessful claimant.²²³

—**Payment from fund.** Where a person is compelled to resort to a court of equity to obtain his rights in respect to a fund in controversy concerning which the opposing party has acted in good faith, it seems that it is proper to charge the costs against the fund,²²⁴ and the same rule applies where funds are realized or preserved by virtue of the litigation. So, in an action to construe a will, where the will is so drawn as to create doubt and to render resort to a court necessary or advisable, costs should be charged on the general estate.²²⁵ It seems that the court cannot require the costs to be paid out of property which does not constitute a fund in court which is to be disposed of by the judgment.²²⁶ Costs are not allowed out of a fund to each claimant as a matter of course, but rest entirely in the discretion of the court.²²⁷

—**Granting costs to defendant as against co-defendant.** In equity, where a defendant is brought into court by no fault of its own, but by the assertion of an unlawful claim on the part of his co-defendant, it is proper that such defendant be indemnified in costs against his co-defendant for his expenses attendant upon its proper representation in the controversy.²²⁸ But where trustees in an action brought as abutters

²²² *Englemon v. Clark*, 2 E. D. Smith, 644, 2 Abb. Pr. 264.

²²³ *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587; *Richards v. Salter*, 8 Johns. Ch. 415. But see *Collins v. Oceanic Steam Nav. Co.*, 1 Wkly. Dig. 12.

²²⁴ So held where a bank was sued to recover a deposit. *Bushnell v. Chaumonts County Nat. Bank*, 74 N. Y. 290. For particular cases relating to payment from fund, see "Costs," p. 462 in Abb. Cyc. Dig.

²²⁵ *Cook v. Munn*, 33 Hun. 35.

²²⁶ *Mills v. Mills*, 50 App. Div. 221, 229, 63 N. Y. Supp. 771.

²²⁷ *Collins v. Oceanic Steam Nav. Co.*, 1 Wkly. Dig. 12.

²²⁸ *Budd v. Munroe*, 18 Hun. 316; *Knapp v. New York El. R. Co.*, 4 Misc. 408, 33 State Rep. 371, 24 N. Y. Supp. 324. But in an action in the nature of quo warranto, brought against a number of defendants,

against an elevated railroad unnecessarily bring in their cestuis que trustent as defendants, on the ground that they refused to join as plaintiffs, it is improper to award costs and allowances to such unnecessary defendants against the defendant railroad company.²⁹⁶

§ 2094. Where part of defendants are successful.

Where, in an action in which the plaintiff is entitled to costs as of course if he is wholly successful, there are two or more defendants and the plaintiff is entitled to costs against one or more but not against all of them, none of the defendants are entitled to costs, of course. In that case, costs may be awarded, in the discretion of the court, to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in an answer, and was not united in interest, with a defendant, against whom the plaintiff is entitled to costs.²⁹⁷ Note that a defendant, though successful, is not entitled to costs, under this Code provision, if he unites in an answer "or" is united in interest with the defendant against whom plaintiff is entitled to costs,²⁹⁸ and furthermore that the successful defendant can only have costs in the "discretion" of the court.²⁹⁹ It follows that a successful defendant cannot enter a judgment for costs without application to the court.³⁰⁰ As

where the court has no power to adjust the ultimate rights of the defendants in the subject of the action it cannot compel a part of the defendants to pay costs to the other defendants. *People v. Albany & S. R. Co.*, 5 Laus. 25.

²⁹⁶ *Roberts v. New York El. R. Co.*, 155 N. Y. 31.

²⁹⁷ Code Civ. Proc. § 3229. This Code provision is based on *Allis v. Wheeler*, 56 N. Y. 59.

²⁹⁸ *Frazer v. Hunt*, 18 Wkly. Dig. 390; *Kraft v. Wilson*, 3 How. Pr. (N. S.) 18, § Civ. Proc. R. (Browne) 359; *Churchill v. Wagner*, 23 Misc. 595, 52 N. Y. Supp. 252; *Park v. Spaulding*, 19 Hun. 128.

²⁹⁹ *Hauselt v. Vilmar*, 76 N. Y. 630; *Van Gelder v. Van Gelder*, 84 N. Y. 658; *Sinskie v. Brust*, 66 App. Div. 34, 72 N. Y. Supp. 922. Rule applied where co-defendant suffered default. *Eastman v. Gray*, 81 Hun. 362, 30 N. Y. Supp. 895.

³⁰⁰ *Bank of Attica v. Wolf*, 18 How. Pr. 102; *Williams v. Blumer*, 49 How. Pr. 12.

to who are "united in interest" reference should be made to a preceding volume.²⁴¹ It has been held that when two persons are made defendants, and sued as joint makers of a promissory note, and they answer separately, and one of them pleads infancy as his sole defense, they thenceforth cease to be "united in interest."²⁴²

§ 2095. Where controversy is submitted.

Where a submission of a controversy is silent as to costs, they are within the discretion of the court.²⁴³

(2) SPECIAL PROCEEDINGS.

§ 2096. Discretion of court.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in the Code, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.²⁴⁴ The discretion will not be exercised against a party who has prevailed on the issue.²⁴⁵

This Code section does not apply where the costs are "specially regulated" by statute.²⁴⁶ Special provisions of the Code and of the general statutes which fix the right to, and amount of, costs in certain special proceedings such as mandamus.²⁴⁷

²⁴¹ Volume I, pp. 496, 497.

²⁴² *Butler v. Morris*, 14 Super. Ct. (1 Barw.) 329.

²⁴³ *Lisy v. Danforth*, 12 App. Div. 465, 45 N. Y. Supp. 1106; Code Civ. Proc. § 3243.

²⁴⁴ Code Civ. Proc. § 3243. What are special proceedings, see vol. 1, p. 12.

²⁴⁵ *Ward v. Ward*, 37 App. Div. 121, 125, 73 N. Y. Supp. 459.

²⁴⁶ *Furman v. Cunningham*, 34 Hun. 603.

²⁴⁷ Code Civ. Proc. § 2000. Where a peremptory writ of mandamus is denied, no alternative writ having been granted, the court may grant costs in its discretion, under Code Civ. Proc. § 3246, since section

supplementary proceedings,²⁴⁸ condemnation proceedings,²⁴⁹ certiorari,²⁵⁰ proceedings for the appointment of a committee for an incompetent,²⁵¹ etc., will not be considered in this connection but will be treated of in the chapters relating to such special proceedings. Costs cannot be allowed in such special proceedings, as of course, unless the right to them is expressly given by the statute.²⁵²

(3) DEMURRER.

§ 2097. Code provision.

There is only one exception to the rule that costs are absolute where a demurrer to a complaint is sustained,²⁵³ and that is furnished by section 3232 of the Code which provides that where an issue of law and an issue of fact are joined between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law, the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.²⁵⁴ Upon sustaining plaintiff's demurrer to a counterclaim pleaded by defendant, the court may award costs to the plaintiff notwithstanding the issues of fact remain to be determined.²⁵⁵ The interlocutory judgment, upon sustaining a demurrer to part

2086, referring particularly to costs in mandamus proceedings, does not refer to costs in cases in which the application for the peremptory writ has been denied. *People v. New York Produce Exch.*, 64 How. Pr. 523.

²⁴⁸ Code Civ. Proc. §§ 2455, 2456.

²⁴⁹ Code Civ. Proc. §§ 3369, 3372.

²⁵⁰ Code Civ. Proc. § 2143.

²⁵¹ Code Civ. Proc. §§ 2336, 2323.

²⁵² *Potter v. Durfee*, 44 Hun, 197, 8 State Rep. 261, 26 Wkly. Dig. 329

²⁵³ *Tallman v. Bernhard*, 75 Hun, 30, 27 N. Y. Supp. 6. This is so though plaintiff is a public official. *Keller v. Shrady*, 30 Misc. 833, 61 N. Y. Supp. 1123.

²⁵⁴ *Voght Mfg. & Coach Lace Co. v. Oettinger*, 88 Hun, 52, 34 N. Y. Supp. 731.

²⁵⁵ *Adams v. Ward*, 60 How. Pr. 288; *Doelger v. O'Rourke*, 18 Abb. N. C. 457.

of a pleading, may include costs to be taxed.²⁵⁶ Where defendant amends his answer, and omits a counterclaim which has been demurred to, plaintiff is entitled to costs.²⁵⁷ Costs for arguing a demurrer are waived by consenting to withdraw the case after argument.²⁵⁸ If the demurrer is sustained in part, costs should not be awarded either party.²⁵⁹

(4) MOTIONS.

§ 2098. Scope of subdivision.

Whether the payment of costs will be imposed as a condition of granting a motion which rests in the discretion of the court will not be considered in this connection but reference should be made to the chapters dealing with the particular motion.

§ 2099. Discretion of court.

“Costs, upon a motion in an action, where the costs thereof are not specially regulated in this act, or upon a reference made pursuant to sections 623, 624, 827, or 1015 of this act, may be awarded, either absolutely or to abide the event of the action, or of the reference, to any party, in the discretion of the court or judge.”²⁶⁰ This Code provision applies to a motion for a new trial on exceptions ordered to be heard by the appellate division in the first instance.²⁶¹ Costs will not be

²⁵⁶ *Brassington v. Rohrs*, 3 Misc. 258, 52 State Rep. 171, 23 Civ. Proc. R. (Browne) 146, 22 N. Y. Supp. 761.

²⁵⁷ *Curry v. Blair*, 4 Wkly. Dig. 271. Contra, *Branagan v. Palmer*, 5 Wkly. Dig. 521.

²⁵⁸ *Losee v. Bullard*, 54 How. Pr. 319.

²⁵⁹ *Petrakion v. Arbely*, 23 Civ. Proc. R. (Browne) 183, 26 N. Y. Supp. 731; *Hollingshead v. Woodward*, 35 Hun, 410; *Benner v. Benner*, 35 State Rep. 602, 58 Hun, 609, 12 N. Y. Supp. 472. Where plaintiff was successful as to a demurrer to one of two defenses in two separate actions and a demurrer to the other was overruled, no costs should be allowed to either party. *Sargent v. Sargent Granite Co.*, 3 Misc. 325, 52 State Rep. 517, 23 N. Y. Supp. 886.

²⁶⁰ Code Civ. Proc. § 3236.

²⁶¹ *Miller v. Bush*, 29 App. Div. 117, 51 N. Y. Supp. 486.

awarded on *ex parte* motions.²⁶² Costs are not ordinarily allowed on granting a favor, as where plaintiff moves to consolidate several actions,²⁶³ but it is customary to impose costs as a condition of allowing the favor. But the court, on a motion for discovery and inspection, should grant costs to the moving party where inspection of the document was sought before moving and was unreasonably refused.²⁶⁴ Where a party makes of the other a request that he is entitled to have granted on equitable terms, the other should state the terms on which he is willing to grant it. If he does not do so, he cannot have costs of resisting the necessary motion therefor.²⁶⁵ If the adverse party offers to concede the object of the motion, and pay a part of the costs which the court would grant, it is in the discretion of the court whether they grant full costs if the motion is insisted on.²⁶⁶ A motion to strike out an answer, though denied, will not be with costs where plaintiff was right in serving the notice of motion.²⁶⁷ So costs will not be granted the opposing party where the motion is denied, where his acts between the time of service of notice of the motion and the hearing were the cause of the denial.²⁶⁸ Costs are not allowed for opposing a motion made necessary by an inequitable refusal to correct an irregularity, or waive a default.²⁶⁹ On overruling an answer of a proper but not necessary party, as frivolous, costs should not be awarded to plaintiff where the answer was advantageous to plaintiff.²⁷⁰

If the notice of motion asks for more than the party is entitled to, costs of motion will not be allowed.²⁷¹

²⁶² *Bowne v. Anthony*, 13 How. Pr. 301; *Edlefson v. Duryee*, 21 Hun, 607.

²⁶³ *Ferris v. Betts*, 2 How. Pr. 78.

²⁶⁴ *Brevoort v. Warner*, 8 How. Pr. 321; *Seligman v. Real Estate Trust Co.*, 20 Abb. N. C. 210.

²⁶⁵ *Gaul v. Miller*, 3 Paige, 192.

²⁶⁶ *Stiles v. Fisher*, 3 How. Pr. 52.

²⁶⁷ *Rider v. Bates*, 66 How. Pr. 129.

²⁶⁸ *New York, L. E. & W. R. Co. v. Carhart*, 36 Hun, 288.

²⁶⁹ *Kane v. Van Vranken*, 5 Paige, 62.

²⁷⁰ *Merrill v. Bischoff*, 3 App. Div. 361, 38 N. Y. Supp. 194.

²⁷¹ *Bates v. Loomis*, 5 Wend. 78; *Whipple v. Williams*, 4 How. Pr. 28; *Corbin v. George*, 2 Abb. Pr. 465. Where the notice of motion asks

On a new question²⁷² or technical objection,²⁷³ costs are ordinarily not allowed either party.

It is proper to grant costs to the moving party, though the motion is denied, where he was misled by his adversary's statements.²⁷⁴ Costs will not be allowed the moving party if his affidavits are unnecessarily voluminous,²⁷⁵ and the same rule applies to the opposing party where he is successful and his papers are prepared with a manifest view to increase the costs.²⁷⁶

— **Necessity that notice of motion ask for costs.** Costs cannot be granted on a default if the notice of motion does not specifically ask for them,²⁷⁷ though the rule is otherwise where the motion is contested.²⁷⁸

— **Costs to abide the event.** Costs should not be awarded to abide the event on opening a default,²⁷⁹ but may be on granting an order of discovery,²⁸⁰ or on sustaining a demurrer

two things, in the alternative, one of which the party is not entitled to, costs of opposing must be allowed. *Smith v. Jones*, 2 Code R. 33.

²⁷² *People v. Assessors of Town of Barton*, 44 Barb. 148, 29 How. Pr. 371.

²⁷³ Costs are not allowed on a technical objection, where the practice is unsettled. *Hoffman v. Skinner*, 5 Paige, 526. Although ordinarily when a party asks as a favor to be relieved from his own mistake, he should be required to pay the costs of opposing the motion, yet where the objection is purely inadvertent and technical, and, before the motion, costs have been offered and refused, no costs should be allowed as terms of granting the favor. *Schiller v. Maltbie*, 11 Civ. Proc. R. (Browne) 304.

²⁷⁴ *Leonard v. Manard*, 1 Super. Ct. (1 Hall) 200.

²⁷⁵ *Pitcher v. Clark*, 2 Wend. 632; *Seebor v. Hess*, 5 Paige, 85.

²⁷⁶ *Pitcher v. Clark*, 2 Wend. 631; *Platt v. Torrey*, 18 Wend. 572; *Townsend v. Babcock*, 18 Wend. 637; *City of Buffalo v. Scranton*, 20 Wend. 676; *Sands v. Bullock*, 20 Wend. 680.

²⁷⁷ *Northrop v. Van Dusen*, 5 How. Pr. 134, 3 Code R. 140; *Smith v. Fleischman*, 17 App. Div. 532, 79 State Rep. 553, 45 N. Y. Supp. 553. Costs not given on an order to show cause unless asked therein. *Hoffman v. Lux*, 1 Month. Law Bul. 91.

²⁷⁸ If the motion is contested, costs, whether asked for or not, are in the discretion of the court. *Banta v. Marcellus*, 2 Barb. 373; *Jones v. Cook*, 11 Hun, 230.

²⁷⁹ *Richardson v. Sun Printing & Pub. Ass'n*, 20 App. Div. 329, 46 N. Y. Supp. 814.

²⁸⁰ *McGrath v. Alger*, 40 App. Div. 610, 57 N. Y. Supp. 519.

with leave to amend,²⁸¹ or on granting a compulsory reference,²⁸² or on granting a motion to change the place of trial,²⁸³ or on granting a motion for a new trial.^{283a} If costs of a motion are ordered to abide the event of the action, they may be taxed as part of the costs of the action.²⁸⁴

(C) ACTIONS AGAINST PARTICULAR PERSONS.

§ 2100. Actions against school officer or supervisor.

Costs cannot be awarded to the plaintiff, in an action against a school officer, or a supervisor, on account of an act performed by him, by virtue of, or under color of his office; or on account of a refusal or an omission to perform a duty enjoined upon him by law; where his act, refusal, or omission might have been the subject of an appeal to the state superintendent of public instruction, and where it is certified that it appeared, upon the trial, that the defendant acted in good faith. But this section does not apply to an action for a penalty; or to an action or a special proceeding, to enforce a decision of the superintendent.²⁸⁵ The certificate only relates to the good faith of the school officers in the performance of the act which forms the subject of the action: it has no relation to the good faith of the parties in prosecuting or defending the action or in bringing or defending appeals in the course of the action.²⁸⁶ There cannot be a second or different certificate in any stage of the action subsequent to the trial.²⁸⁷ The school officers are exempted, where the certificate is given, from costs throughout all the stages of the action.²⁸⁸ The matter of costs

²⁸¹ *Willover v. First Nat. Bank of Olean*, 40 Hun, 184.

²⁸² *Cuthbert v. Hutchins*, 7 App. Div. 251, 40 N. Y. Supp. 277.

²⁸³ *Gidney v. Spelman*, 6 Wend. 525; *Norton v. Rich*, 20 Johns. 475.

^{283a} *Chapman v. Delaware, L. & W. R. Co.*, 92 N. Y. Supp. 304.

²⁸⁴ Code Civ. Proc. § 779.

²⁸⁵ Code Civ. Proc. § 3244. As to when it is proper to refuse a certificate of good faith, see *Barrett v. Sayer*, 58 Hun, 608, 12 N. Y. Supp. 170. As when an appeal may be taken to the state superintendent, see *Durfee v. McCall*, 21 Wkly. Dig. 337.

²⁸⁶, ²⁸⁷ *Willey v. Shaver*, 1 T. & C. 324, 328.

²⁸⁸ *Willey v. Shaver*, 1 T. & C. 324, 329. Exemption covers costs on motion by defendants for a new trial. *Clarke v. Tunnicliff*, 38 N. Y. 58.

in these actions is also regulated by other statutes contained in the Revised Statutes.²⁸⁹

§ 2101. Actions against municipal corporations.

The Code provides as follows: "Costs cannot be awarded to the plaintiff, in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only, unless the claim on which the action is founded, was, before the commencement of the action, presented to the board of such corporation having the power to audit the same, or to its chief fiscal officer, at least ten days before the commencement of said action."²⁹⁰ This Code provision applies only to actions *ex contractu*.²⁹¹ It does not apply to special proceedings,²⁹² nor to an action commenced in a justice court and appealed to the county court,²⁹³ nor to the costs of an appeal.²⁹⁴ Prior to 1899, the claim was required to be presented to the "chief fiscal officer," but now the claim may be presented either to such officer or to "the board of such corporation having the power to audit the same." Since the amendment, there is no question but that presentation to a board of water commissioners who made the contract under which the claim arose, and to their treasurer, where the treasurer of the village has no control over the waterworks fund, is sufficient.²⁹⁵ The "chief fiscal officer" is the officer who receives, keeps, and disburses the moneys of the corporation.²⁹⁶ The "fiscal officer"

²⁸⁹ See *People v. Abbott*, 107 N. Y. 225.

²⁹⁰ Code Civ. Proc. § 3245.

²⁹¹ *Taylor v. City of Cohoes*, 105 N. Y. 54; *Gage v. Village of Hornellsville*, 106 N. Y. 667; *McClure v. Niagara County Sup'rs*, 50 Barb. 594.

²⁹² Proceedings to vacate an assessment. *Matter of Jetter*, 78 N. Y. 601.

²⁹³ *Marsh v. Village of Lansingburgh*, 31 Hun, 514.

²⁹⁴ *Utica Water-Works Co. v. City of Utica*, 31 Hun, 426.

²⁹⁵ See *Hallinan v. Village of Ft. Edward*, 26 Misc. 422, 57 N. Y. Supp. 162. Contra, *King v. Village of Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902. Both these cases were decided before the amendment took effect.

²⁹⁶, ²⁹⁷ *Gage v. Village of Hornellsville*, 106 N. Y. 667.

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of a village²⁹⁷ or city²⁹⁸ is usually the treasurer. Presentation to the common council of a city has been held sufficient.²⁹⁹ A claim against a town, where there is no town treasurer, may be presented to the supervisor.³⁰⁰ The omission to present the claim is not excused because the officer to whom the claim must be presented has no power to adjust such a claim.³⁰¹ The claim must be presented by one who asserts authority to act for the claimant, and in such a manner as to afford opportunity and sufficient information to the officer to enable him to present it to the proper auditing officers and to procure authority to pay.³⁰² A verified statement must be presented.³⁰³ It is immaterial, it seems, that the amount named in the complaint does not correspond to the amount claimed in the verified statement if both refer to the same claim.³⁰⁴ No certificate of the judge presiding on the trial is required to defeat plaintiff's claim for costs where the claim is not presented.³⁰⁵ If the claim is not presented and plaintiff succeeds, neither party is entitled to costs.³⁰⁶

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§ 2102. Where there are several successful defendants.

Where defendants appear by the same attorney, as a general rule, but one bill of costs is allowed, where the defense is substantially the same,³⁰⁷ although they answer separately.³⁰⁸

²⁹⁸ *Hunt v. City of Oswego*, 45 Hun, 305.

²⁹⁹ *Butler v. Rochester*, 4 Hun, 321, 6 T. & C. 572; *Williams v. Buffalo*, 25 Hun, 301. Claim rejected by council need not be presented to treasurer. *Grier v. City of Lockport*, 21 Wkly. Dig. 444.

³⁰⁰ *Stanton v. Town of Taylor*, 45 State Rep. 906, 19 N. Y. Supp. 43.

³⁰¹ *Baine v. Rochester*, 85 N. Y. 523; *Dressel v. City of Kingston*, 32 Hun, 526.

³⁰² *Spaulding v. Village of Waverly*, 12 App. Div. 594, 44 N. Y. Supp. 112.

³⁰³ *King v. Village of Randolph*, 28 App. Div. 25, 50 N. Y. Supp. 902.

³⁰⁴ *Minick v. City of Troy*, 83 N. Y. 514.

³⁰⁵, ³⁰⁶ *Baine v. Rochester*, 85 N. Y. 523.

³⁰⁷ *Walker v. Russell*, 7 Abb. Pr. 452, note, 16 How. Pr. 91; *Zeisler v. Steinmann*, 53 Super. Ct. (21 J. & S.) 184; *Bailey v. Johnson*, 1 Daly, 61.

³⁰⁸ *Atkins v. Lefever*, 5 Abb. Pr. (N. S.) 221.

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But where the summons and complaint are not served on a defendant until after a co-defendant has appeared and answered, and the answers are substantially different, each defendant is entitled to costs, although they appeared by the same attorney.³⁰⁹ And separate bills of costs are proper where two defendants originally appear by the same attorney but by separate answers and subsequently have different attorneys.³¹⁰

Where all the defendants have succeeded upon the trial, those not united in interest who have appeared by different attorneys have the right to present separate bills of costs, unless it is shown that the parties are united in interest or conclusively appeared by separate attorneys in bad faith, for the purpose of enhancing the plaintiff's costs.³¹¹ If defendants separately answer without good cause, only one bill of costs can be taxed.³¹² The burden of proving bad faith rests upon the plaintiff. In case more than one bill of costs is taxed, he can move at special term for a retaxation, and that one bill be stricken out.³¹³ Members of a public board sued for an official act cannot sever so as to obtain more than one bill of costs;³¹⁴

³⁰⁹ *Mazet v. Crow*, 24 Abb. N. C. 372, 18 Civ. Proc. R. (Browne) 178, 31 State Rep. 972, 10 N. Y. Supp. 743.

³¹⁰ *Pierce v. Brown*, 40 Super. Ct. (8 J. & S.) 398.

³¹¹ *Delaware, L. & W. R. Co. v. Burkard*, 40 Hun. 625, 2 State Rep. 184; *Lane v. Van Orden*, 63 How. Pr. 237; *Wolf v. Di Lorenzo*, 22 Misc. 323, 49 N. Y. Supp. 191. The fact that the attorneys appearing for defendants answering separately, occupy the same office, affords strong grounds for presuming that the separation is for the purpose of increasing the costs. *Slater Bank v. Sturdy*, 15 Abb. Pr. 75. Several defendants, appearing by different attorneys who are partners, are entitled, if they succeed, to only one bill of costs. *Crofts v. Rockefeller*, 1 Code R. (N. S.) 177, 6 How. Pr. 9. Defendants interposing separate answers by different attorneys are presumably entitled to separate bills of costs; but such presumption is destroyed by proof that one of the attorneys is the clerk of the other, occupying the same office. *Howell v. Veith*, 2 City Ct. R. 405; *Perry v. Livingston*, 6 How. Pr. 404.

³¹² *Ackroyd v. Newton*, 24 Misc. 424, 53 N. Y. Supp. 682.

³¹³ Defendants having answered in good faith by two sets of attorneys are entitled to the allowance of two bills of costs without any order. *Royce v. Jones*, 23 Hun, 452.

³¹⁴ *Stewart v. Schultz*, 33 How. Pr. 3.

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though it has been held otherwise where different boards and individuals were joined as defendants, and the appearance by separate attorneys was justified by custom.³¹⁵ A party appearing in person and likewise by attorney as guardian for infant defendants, and interposing substantially the same defense in both issues, although by separate answers, is entitled to but one bill of costs.³¹⁶

The provision in section 1426 of the Code that if the indemnitors substituted in the place of the sheriff in an action against the sheriff recover judgment "they are entitled to single costs only" does not mean only one bill of costs but means single costs as distinguished from double costs.³¹⁷

§ 2103. Where there are several unsuccessful defendants.

Separate bills of costs will not be allowed against separate defendants though they appear by different attorneys.³¹⁸ If one defendant makes default and the other interposes an unsuccessful defense, the entire costs may be taxed against both defendants if the liability is joint³¹⁹ or is joint and several;³²⁰ but plaintiff may, on proper proof, enter a separate judgment against the defaulting defendant, with costs.³²¹

§ 2104. Motion costs.

But one bill of costs will be allowed where two motions are made where the relief might be obtained by one,³²² or where

³¹⁵ Hequembourg v. Bookstaver, 54 Hun, 88, 7 N. Y. Supp. 217.

³¹⁶ Browne v. Murdock, 12 Abb. N. C. 360.

³¹⁷ Isaacs v. Cohen, 86 Hun, 119, 33 N. Y. Supp. 188.

³¹⁸ Buell v. Gay, 13 How. Pr. 31; Coddling v. Scott, 1 Misc. 485, 21 N. Y. Supp. 473. Compare, however, as contra, McIntyre v. Wynne, 21 Civ. Proc. R. (Browne) 208, 16 N. Y. Supp. 540; Comstock v. Halleck, 6 Super. Ct. (4 Sandf.) 671; Miller v. Coates, 5 T. & C. 690.

³¹⁹ Catlin v. Billings, 13 How. Pr. 511, 4 Abb. Pr. 248.

³²⁰ Warner v. Ford, 17 How. Pr. 54; Delatour v. Bricker, 2 City Ct. R. 22.

³²¹ Howk v. Bishop, 10 Hun, 509.

³²² Cortland County Mut. Ins. Co. v. Lathrop, 2 How. Pr. 146. If a party makes two motions where the relief might be obtained by one, he

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the motion is entitled in several actions.³²³ So where several motions are made by the same attorneys on one set of papers, and granted with costs against the other party, costs are allowed only for one motion.³²⁴

ART. IV. PERSONS LIABLE.

§ 2105. Scope of article.

Conceding that some one is liable for costs, the question often arises as to what particular person is liable. To answer that question is the scope of this article.

§ 2106. Third persons where judgment is for defendant.

The Code provides that "where an action is brought, in the name of another, by a transferee of the cause of action, or by any other person, who is beneficially interested therein, or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee, or other person so interested, is liable for costs in the like cases and to the same extent as if he was the plaintiff, and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them."³²⁵ It will be observed that this Code provision covers (1) an action brought in the name of another by a transferee of the cause of action; (2) an action

must pay costs of opposing as of one motion. *Mitchell v. Westervelt*, 6 How. Pr. 265.

³²³ *Jackson v. Keller*, 18 Johns. 310; *Jackson v. Garnsey*, 3 Cow. 385. In actions between the same parties and in the same court, when one of the parties moves in each at the same time and with the same object, the party prevailing on the motion is entitled to the costs of one motion only. *Hornfager v. Hornfager*, 6 How. Pr. 13, Code R. (N. S.) 180.

³²⁴ *Jackson v. Keller*, 18 Johns. 310; *Jackson v. Garnsey*, 3 Cow. 385; *Jerome v. Boeram*, 1 Wend. 293; *Schermerhorn v. Noble*, 1 Denio, 682; *Post v. Jenkins*, 2 How. Pr. 33; *Cortland County Mut. Ins. Co. v. Lathrop*, 2 How. Pr. 146.

³²⁵ Code Civ. Proc. § 3247. Rule in ejectment where grantee sues in name of grantor, see Code Civ. Proc. § 1501.

brought in the name of another by a person “beneficially interested” in the cause of action other than a transferee thereof; and (3) an action where, after its commencement, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action. It seems that this Code provision applies only to one “prosecuting” an action and not to one defending an action.³²⁶ The third person, in a proper case, is liable for the costs accruing before he obtains his interest as well as those accruing thereafter.³²⁷

—**Action by assignee.** If the action is brought in the name of another by a transferee of the cause of action or if, after the commencement of the action, the cause of action becomes, by transfer or otherwise, the property of a person not a party to the action, the transferee becomes liable for costs. The test of the liability for costs of one becoming owner of the cause of action, pending the action, is whether he would have been liable if he had brought the action.³²⁸ An absolute assignee is liable irrespective of whether he took any part in the action.³²⁹ A person is not liable, however, who merely takes an assignment of the claim as collateral security.³³⁰ One who receives an assignment of a judgment after it is docketed, and afterwards reassigns the judgment to the assignor, is not liable for the costs when the judgment is afterwards set aside.³³¹ An attorney who gives defendant notice that he is absolute assignee of the demand in suit cannot deny it in order to avoid being charged with costs.³³²

³²⁶ *Peetsch v. Quinn*, 12 Misc. 61, 33 N. Y. Supp. 87. This was so held under the Revised Statutes (*Miller v. Adsit*, 18 Wend. 672) which corresponded closely to the present Code provision. The contrary was held under the old Code (*Wolcott v. Holcomb*, 31 N. Y. 125) which, however, was broader than the like provision of the Revised Statutes.

³²⁷ *Jordan v. Sherwood*, 10 Wend. 622; *Genet v. Davenport*, 58 N. Y. 607; *Tucker v. Gilman*, 58 Hun, 167, 11 N. Y. Supp. 555.

³²⁸ *Conger v. Hudson River R. Co.*, 7 Abb. Pr. 255.

³²⁹ *Dowling v. Bucking*, 15 Abb. Pr. (N. S.) 190, 52 N. Y. 658; *Tucker v. Gilman*, 58 Hun, 167, 11 N. Y. Supp. 555.

³³⁰ *Thorn v. Beard*, 139 N. Y. 482; *Dowling v. Bucking*, 52 N. Y. 658; *Peck v. Yorks*, 75 N. Y. 421.

³³¹ *Chamberlin v. West*, 5 N. Y. Leg. Obs. 226.

³³² *Bliss v. Otis*, 1 Denio, 656.

Of course the person who assigns his cause of action pending the suit is still primarily liable for costs.³³³

— **Who is “beneficially interested” in an action.** Where an action is brought in the name of another by a person “beneficially interested” in the cause of action, the latter is liable for costs as if the party of record. The term “person beneficially interested” is equivalent to “real party in interest.”³³⁴ Thus, a principal may be the “person beneficially interested” where the action is brought in the name of his agent.³³⁵ Where an action is brought in the plaintiff’s name by another, under an agreement securing the latter a beneficial interest in the anticipated recovery, the latter is liable for costs, though the agreement was champertous.³³⁶ A holder of a mortgage who procured the mortgagor to bring an action against one who was alleged to have agreed with her to assume its payment, for a specific performance of such alleged agreement, is a person “beneficially interested” in the recovery and properly chargeable with the defendant’s costs, although himself nominally a defendant in the action, but never served with the summons.³³⁷ Where the owner of a claim assigned it, the assignee to prosecute an action thereon at his own expense, and pay the assignor one-half of the net proceeds, the assignor was beneficially interested in the recovery, and liable for costs, although he did not appoint or retain the attorney, furnish funds for the prosecution of the action, nor in any way interfere with or direct it.³³⁸ One who agrees with parties to an action who have been unsuccessful, that he will cause appeals from the judgment against them to be taken and pay the expenses, and, if successful, an additional sum to them (he himself to have the moneys recovered), thereby becomes a purchaser of the claims of the defeated defendants after the commencement of the action, and is liable for the costs in the

³³³ *Grosfent v. Tallman*, 2 How. Pr. 147.

³³⁴, ³³⁵ *Henricus v. Englert*, 43 State Rep. 598, 17 N. Y. Supp. 237.

³³⁶ *Giles v. Halbert*, 12 N. Y. (2 Kern.) 32.

³³⁷ *Slauson v. Watkins*, 95 N. Y. 369.

³³⁸ *Merceron v. Fowler*, 46 Super. Ct. (14 J. & S.) 351. To same effect, *In re Tyng*, 17 Wkly. Dig. 234.

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same manner as if he were a party.³³⁹ A purchaser of a cause of action who has assigned it cannot be made liable for costs recovered by the defendant in an action brought by his assignee in the name of the original assignor, where he has not participated in or directed the conduct of such action, notwithstanding the second assignment is void for champerty.³⁴⁰ The decision of a trial court directing a verdict for defendant, on the ground that the plaintiff is not the real party in interest, an assignment to him of the claim in suit being only colorable, establishes the fact of the beneficial interest of the pretended assignors for the purpose of charging them with costs.³⁴¹ Costs of an unsuccessful action brought in the name of a pretended corporation which did not in fact exist, are properly charged against the promoter, he being also the person beneficially interested.³⁴² The assignor is liable where he assigns a desperate claim to a person pecuniarily irresponsible,³⁴³ or where he is a nonresident and assigns the claim to a resident to avoid security for costs, the equitable and beneficial interest remaining in the assignor.³⁴⁴

On the other hand, the fact that a person having a lien for his debt on a chose in action, occasionally inquires as to its progress of the attorney who holds it for prosecution, admits himself to be interested, and advises and urges the suit, are not of themselves enough to charge him with the defendant's costs.³⁴⁵ So a person to whom a judgment is to be paid, if a recovery is had, is not beneficially interested where the suit is prosecuted without his knowledge or consent.³⁴⁶ So a person who has in good faith advanced money to plaintiff to enable

³³⁹ *Olmstead v. Keyes*, 2 How. Pr. (N. S.) 1.

³⁴⁰ *Bradley v. Van Buren*, 22 Wkly. Dig. 568.

³⁴¹ *In re Tyng*, 17 Wkly. Dig. 234.

³⁴² *Metropolitan Addressing & Mailing Co. v. Goodenough*, 21 Civ. Proc. R. (Browne) 268, 18 N. Y. Supp. 212; *First General, etc., Baptist Soc. v. Loomis*, 49 Hun, 414, 3 N. Y. Supp. 572.

³⁴³ *Winants v. Blanchard*, 12 State Rep. 384.

³⁴⁴ *Pendleton v. Johnson*, 21 Civ. Proc. R. (Browne) 272, 18 N. Y. Supp. 211.

³⁴⁵ *Whitney v. Cooper*, 1 Hill, 629.

³⁴⁶ *Elliot v. Lewicky*, 51 Super. Ct. (19 J. & S.) 51

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him to carry on the action without taking any assignment of the cause of action is not a party beneficially interested, so as to be liable for the costs of the action.³⁴⁷ And sureties on a bail bond who prosecute the action brought by their principal, to protect themselves, are not "beneficially interested" so as to be liable for costs.³⁴⁸ One is chargeable with costs as a party in interest only where he has had the action brought, but it is not enough that, had the suit succeeded, the recovery would have been for his exclusive benefit.³⁴⁹

The statute making persons interested liable for costs was not intended to apply to actions brought in the name of sheriffs, receivers, clerks, or other officers of the court, although third parties may be interested in the recovery, unless the action be brought on the sole suggestion and urgency of such parties, and be virtually conducted by them; especially the statute is not applicable if the action be brought by direction of a court.³⁵⁰ Thus, a judgment creditor is not liable for costs of the action of his receiver in supplementary proceedings where not a party to the suit nor the person instigating the suit;³⁵¹ but if a creditor at whose instance a receiver has been appointed instigates and conducts a prosecution for his own benefit, through the receiver, he will be liable for costs of the action.³⁵² So an assignee for benefit of creditors, by assignment pending the action, is not "beneficially interested" where he makes no claim in the action and is not substituted as a party.³⁵³ The same rule applies to an assignee in bankruptcy.³⁵⁴

³⁴⁷ *Matter of Harwood*, 50 State Rep. 114, 21 N. Y. Supp. 572.

³⁴⁸ *Metropolitan Concert Co. v. Sperry*, 58 Hun, 470, 12 N. Y. Supp. 494.

³⁴⁹ *Greenwood v. Marvin*, 11 State Rep. 235.

³⁵⁰ *Cutter v. Reilly*, 28 Super. Ct. (5 Rob.) 637.

³⁵¹ *McHarg v. Donnelly*, 27 Barb. 100; *Wheeler v. Wright*, 14 Abb. Pr. 353, 23 How. Pr. 228; *Cutter v. Reilly*, 28 Super. Ct. (5 Rob.) 637.

³⁵² *Gallation v. Smith*, 48 How. Pr. 477; *Ward v. Roy*, 69 N. Y. 96; *Bourdon v. Martin*, 84 Hun, 179, 65 State Rep. 716, 32 N. Y. Supp. 441; *O'Conner v. Merchants' Bank*, 64 Hun, 624, 19 N. Y. Supp. 319. See, also, *Droege v. Baxter*, 77 App. Div. 78, 79 N. Y. Supp. 29.

³⁵³ *McCarthy v. Wright*, 56 Hun, 387, 10 N. Y. Supp. 824; *Snow v. Green*, 1 How. Pr. 216; *Taylor v. Bolmer*, 2 Denio, 193.

³⁵⁴ *Heather v. Neil*, 14 Wkly. Dig. 46.

Art. IV. Persons Liable.—Third Persons.

This Code provision is not applicable where the person so beneficially interested is the attorney or counsel for the plaintiff if his only beneficial interest consists of a right to a portion of the sum or property recovered as compensation for his services in the action.³⁵⁵ So the rule does not apply where the claim has been assigned to a third person as security for the payment of the attorney's compensation.³⁵⁶

— **Enforcement of liability of third person.** Where costs are awarded against plaintiff, the court may, by order, direct payment by the third person who is liable.³⁵⁷ The return of an execution unsatisfied is sufficient evidence of inability to collect from the plaintiff,³⁵⁸ but no execution need be issued and returned unsatisfied where the plaintiff of record is not a legal entity so as to be capable of owning property.³⁵⁹ A motion should be made at special term and notice served on the third person.³⁶⁰ The burden of showing the necessary facts is on the moving party.³⁶¹ The order cannot be made until after a judgment for the costs has been perfected,³⁶² nor while an appeal is pending.³⁶³ The motion should be supported by affidavits to show the liability of the person sought to be charged and counter-affidavits may be received to show the real nature of his interest.³⁶⁴ The denial of a motion by defendant to substitute the holder of a mortgage as plaintiff is not a bar to the application to charge him with costs.³⁶⁵

³⁵⁵ Code Civ. Proc. § 3247.

³⁵⁶ Banta v. Naughton, 7 State Rep. 384.

³⁵⁷ Code Civ. Proc. § 3247.

³⁵⁸ Pendleton v. Johnson, 21 Civ. Proc. R. (Browne) 272, 18 N. Y. Supp. 211. In Perrigo v. Dowdall, 25 Hun, 234, it is said to be the only evidence.

³⁵⁹ Metropolitan Addressing & Mailing Co. v. Goodenough, 21 Civ. Proc. R. (Browne) 268, 18 N. Y. Supp. 212.

³⁶⁰ Carnahan v. Pond, 15 Abb. Pr. 194; Henry v. Derby, 11 Civ. Proc. R. (Browne) 106. Notice should be served on third person and not on plaintiff's attorney. *Id.*

³⁶¹ Wolcott v. Holcomb, 31 N. Y. 125.

³⁶² Fredericks v. Niver, 28 Hun, 417.

³⁶³ Slauson v. Watkins, 46 Super. Ct. (14 J. & S.) 172.

³⁶⁴ See Whitney v. Cooper, 1 Hill, 629.

³⁶⁵ Slauson v. Watkins, 95 N. Y. 369.

Disobedience to the order is a contempt of court except where the third person is one who could not have been lawfully directed to pay the costs personally if he had been made a party, as prescribed in section 3246 of the Code, i. e., where such person is an executor or administrator or trustee of an express trust or a person expressly authorized by statute to sue or to be sued.³⁶⁶ Such third person may be fined the amount of the costs which he has been directed to pay without any further proof to show damage than that he has refused to pay them.³⁶⁷ Of course it would be unjust to compel payment by such third person by imprisonment for contempt where he has no property out of which the costs might be collected.³⁶⁸

§ 2107. Third persons who defend in name of defendant.

When a person, not a defendant on the record, to whom the statute gives the opportunity of defending, avails himself of the opportunity by defending in the name of the party sued without himself asking to be brought in, he is liable for costs if they cannot be collected of the defendant of record.³⁶⁹

§ 2108. Parties suing or sued in representative capacity.

“In an action brought by or against an executor or administrator in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded as in an action by or against a person prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of the Code; but they are exclusively chargeable upon, and collectible from

³⁶⁶ Code Civ. Proc. § 3247.

³⁶⁷ *Tucker v. Gilman*, 20 Civ. Proc. R. (Browne) 397, 14 N. Y. Supp. 392, 58 Hun, 170, 11 N. Y. Supp. 167, which also held that the fact that such costs were directed to be paid to defendant's attorney instead of to defendant was immaterial.

³⁶⁸ *Morrison v. Lester*, 15 Hun, 538.

³⁶⁹ *Farmers' Loan & Trust Co. v. Kursch*, 5 N. Y. 558; *Perrigo v. Dowdall*, 25 Hun, 234. So held in ejectment where a mortgagee assumed the defense. *Sand v. Church*, 32 App. Div. 139.

 Art. IV. Persons Liable.—Parties Acting as Representatives.

the estate, fund, or person represented, unless the court directs them to be paid by the party personally, for mismanagement or bad faith in the prosecution or defense of the action."³⁷⁰ Analyzing this Code provision it will be noticed that it applies to actions "by" or "against" the persons named. It applies to (1) executors or administrators suing or sued in their representative capacity, (2) trustees of express trusts, and (3) persons expressly authorized by statute to sue or to be sued. Who is a trustee of an express trust has been considered in a preceding volume,³⁷¹ as has the question who are persons expressly authorized by statute to sue or to be sued.³⁷² This Code provision applies to an assignee in bankruptcy.³⁷³ Observe, furthermore, that this Code provision does not fix the "right" to costs but merely settles the question whether the party who acts in a representative capacity shall be personally liable for the costs or whether the costs shall be charged to the estate or person represented.³⁷⁴ It must appear that the prosecution or defense was necessarily in a representative capacity,³⁷⁵ and the representative capacity must be shown by the pleadings.³⁷⁶ An executor or administrator need prosecute an action only where the cause of action arose during the lifetime of the deceased;³⁷⁷ and where an executor or administrator needlessly sues in his representative capacity he will be charged personally with the costs where unsuccessful.³⁷⁸ This Code section applies where the action is against executors in their

³⁷⁰ Code Civ. Proc. § 3246.

³⁷¹ Volume 1, p. 388.

³⁷² Volume 1, p. 392.

³⁷³ *Reade v. Waterhouse*, 52 N. Y. 587.

³⁷⁴ See *Cohu v. Husson*, 56 Super. Ct. (24 J. & S.) 489.

³⁷⁵ *People v. Judges of Albany Mayor's Court*, 9 Wend. 486; *Carnahan v. Pond*, 15 Abb. Pr. 194.

³⁷⁶ *Murray v. Hendrickson*, 6 Abb. Pr. 96; *Carnahan v. Pond*, 15 Abb. Pr. 194.

³⁷⁷ *Mullen v. Guinn*, 88 Hun, 128; *Hone v. De Peyster*, 106 N. Y. 645. For other cases as to when action is necessarily brought in representative capacity, see 6 Abb. Cyc. Dig. 474, 475.

³⁷⁸ *Ackley v. Ackley*, 50 State Rep. 554, 21 N. Y. Supp. 877; *Buckland v. Gallup*, 105 N. Y. 453.

representative capacity, but the right to maintain the same, and the obligations of the defendants with respect thereto, are entirely independent of any matters which concern the administration of the estate or the property of the deceased.³⁷⁹

— **What constitutes bad faith or mismanagement.** No general rule can be laid down as to what constitutes bad faith or mismanagement in the prosecution or defense of an action but each case must depend largely on the attending circumstances. It should be kept in mind, however, that the bad faith or mismanagement must be in connection with the particular action and not in connection with the trust generally.³⁸⁰ Thus, payment of funds pending the action, sufficient in amount to pay the judgment for costs, does not show bad faith or mismanagement in respect to the “defense or prosecution of the action.”³⁸¹ It seems that there is mismanagement where an action is brought without probable cause or without ordinary care and diligence in determining if there was a just cause of action.³⁸² Thus, a receiver bringing an action without leave,³⁸³ or, it seems, where he has no funds in his hands,³⁸⁴ is guilty of mismanagement and bad faith and may be ordered to personally pay the costs.

An assignee for benefit of creditors should not be personally charged with the costs where he defended a successful action to set aside the assignment as in fraud of creditors, he not being personally acquainted with the facts constituting the fraud.³⁸⁵ So a trustee should not be charged personally with the costs

³⁷⁹ *Dunn v. Arkenburgh*, 48 App. Div. 518, 521, 62 N. Y. Supp. 861.

³⁸⁰ *Kimberly v. Stewart*, 22 How. Pr. 281; *Jack v. Robie*, 48 Hun, 181, 184.

³⁸¹ *Jack v. Robie*, 48 Hun, 181, which overrules *Butler v. Boston & A. R. Co.*, 24 Hun, 99.

³⁸² *Roosevelt v. Ellithorp*, 10 Paige, 415.

³⁸³ *Phelps v. Cole*, 3 Code R. 157; *Murray v. Hendrickson*, 6 Abb. Pr. 96, 14 Super. Ct. (1 Bosw.) 635.

³⁸⁴ *Cumming v. Egerton*, 22 Super. Ct. (9 Bosw.) 684. The contrary was held where an assignee for benefit of creditors sued on advice of counsel and in good faith. *Cunningham v. McGregor*, 12 Super. Ct. (5 Duer) 648.

³⁸⁵ *Faxon v. Mason*, 76 Hun, 408, 413, 27 N. Y. Supp. 1025.

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where he sues and thereafter it is decided that his appointment was void;³⁸⁶ though it has been held that where a person sues as assignee and it is decided that the assignment is void, plaintiff cannot claim exemption from costs.³⁸⁷ Payment of other claims without paying the judgment for costs does not show bad faith.³⁸⁸

This Code provision applies, in part at least, to the costs of an appeal and interlocutory costs.³⁸⁹ It has been held that the taking of an appeal unnecessarily may constitute bad faith or mismanagement,³⁹⁰ though the mere fact that the appeal is unsuccessful is not sufficient of itself to charge the party personally with costs.³⁹¹

—**Procedure to charge representative with costs.** If an executor or administrator sues or is sued in his personal capacity and is defeated, the opposing party may tax costs without an application to the court. But if the party sues or is sued in a representative capacity, the party is not personally liable for costs unless an order is entered to that effect which must be made by the court in the original action,³⁹² on notice to the party to be charged.³⁹³ Judgment for costs against a plaintiff suing as administrator should be entered against him "as administrator," and not personally, but it should not be inserted in the judgment that the costs are "exclusively chargeable upon and collectible from the estate," where plaintiff's person-

³⁸⁶ *Hughes v. Cuming*, 63 App. Div. 363, 71 N. Y. Supp. 599.

³⁸⁷ *Sibell v. Remsen*, 30 Barb. 441.

³⁸⁸ *Devendorf v. Dickinson*, 21 How. Pr. 275.

³⁸⁹ *Benjamin v. Ver Nooy*, 168 N. Y. 578; *Hunt v. Connor*, 17 Abb. Pr. 466.

³⁹⁰ *Pittman v. Johnson*, 35 Hun, 38, 42; *Smith v. Central Trust Co.*, 154 N. Y. 333, 341; *Matter of McCarter*, 94 N. Y. 558, 562.

³⁹¹ *Devendorf v. Dickinson*, 21 How. Pr. 275; *Harrington v. Strong*, 49 App. Div. 39, 63 N. Y. Supp. 257.

³⁹² Cannot be made on appeal. *Gorden v. Strong*, 160 N. Y. 696 (mem.); *Smith v. A. D. Farmer Type Founding Co.*, 18 Misc. 434, 41 N. Y. Supp. 788. The order cannot be made in a collateral proceeding such as the final accounting of the executors before the surrogate. *Harrington v. Strong*, 49 App. Div. 39, 63 N. Y. Supp. 257.

³⁹³ *Slocum v. Barry*, 38 N. Y. 46; *First Nat. Bank of Canton v. Washburn*, 20 App. Div. 518, 47 N. Y. Supp. 117.

al liability has not been passed upon.³⁹⁴ The motion should be made at special term but it need not be made to the judge before whom the trial was had.³⁹⁵ The motion should be based on affidavits which should clearly show the bad faith or mismanagement.³⁹⁶ It seems that where the trial court has ordered a judgment for costs against a party in his representative capacity, a motion cannot thereafter be made to charge the party personally with costs since it is considered a collateral attack on the implied holding that the party is not personally liable.³⁹⁷ The costs are collectible from the estate in the absence of an order charging the executor with mismanagement or bad faith.

§ 2109. Executors and administrators.

Costs cannot be allowed against an executor or administrator unless provided for by statute. There are several Code provisions relating thereto which are difficult to reconcile. First, as already stated,³⁹⁸ the Code provides in section 3228 that plaintiff is entitled to costs as of course on the rendering of a final judgment in his favor in actions of which a justice of the peace has no jurisdiction, and it is provided that a justice has no jurisdiction of an action against an executor or administrator as such, where the claim has been duly presented to the executor or administrator and rejected by him, unless the amount of the claim is less than fifty dollars. Now, if this Code provision stood alone, it would follow that if a claim for more than fifty dollars is presented and rejected, the claimant may recover the costs of an action without regard to the amount of the recovery; and it would follow that if the claim was less than fifty dollars then the defendant would be entitled to costs under section 3229 of the Code. This section

³⁹⁴ *Weekes v. Garvey*, 56 Super. Ct. (24 J. & S.) 562, 4 N. Y. Supp. 891.

³⁹⁵ Especially is this so where the trial judge declined to entertain the motion. *Bourdon v. Martin*, 74 Hun, 246, 26 N. Y. Supp. 378.

³⁹⁶ *McGovern v. McGovern*, 50 Super. Ct. (18 J. & S.) 390, 394.

³⁹⁷ *Hone v. De Peyster*, 106 N. Y. 645; *Jack v. Robie*, 48 Hun, 181.

³⁹⁸ See ante, p. 2917.

applies only to actions "at law" "against" an executor or administrator but in so far as it conflicts with sections 1835 and 1836, it is controlled by the latter sections.³⁹⁹ Second, it is provided by section 3246 that costs cannot be awarded against executors or administrators personally in an action brought by or against them in their representative capacity, unless there is "mismanagement or bad faith in the prosecution or defense of the action," except as otherwise prescribed in sections 1835 and 1836 of the Code. Section 3246 applies, it seems, to equity actions while sections 1835 and 1836 apply to actions at law.⁴⁰⁰ Sections 1835 and 1836 of the Code will now be considered. They are simply a re-enactment of the provisions of the Revised Statutes.

Section 1835 provides that "where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section." Section 1836 provides as follows: "Where it appears, in a case specified in the last section, that the plaintiff's demand was presented within the time limited by a notice, published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent, provided in section 1822" of the Code, that the claim be heard and determined by the surrogate on the executor's accounting "at least ten days before the expiration of six months from the rejection thereof, the court may award costs against the executor or administrator, to be collected, either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appeared upon the trial. Where the action is brought in the supreme court, the facts must be certified by the judge or referee, before whom the trial took place." Neither section 1835 nor 1836 refers to "special proceedings."⁴⁰¹ Now

³⁹⁹ See *German-American Prov. Co. v. Garrone*, 73 App. Div. 409, 77 N. Y. Supp. 134.

⁴⁰⁰ *Supplee v. Sayre*, 51 Hun, 30, 3 N. Y. Supp. 627.

⁴⁰¹ *Denise v. Denise*, 110 N. Y. 562, 568.

it will be noticed that these two sections must be read together and that section 1836 applies only to “a case specified in section 1835” of the Code. It is therefore necessary to first consider the meaning and application of section 1835. This section applies where a judgment for “a sum of money only” is rendered and it follows that it does not apply to actions for equitable relief.⁴⁰² Furthermore it applies only to actions “against,” not “by,” executors or administrators.⁴⁰³ It does not apply to actions continued against the executor after the death of the testator,⁴⁰⁴ nor to an action on a claim created since the death of the decedent, by or under the supervision of the executors,⁴⁰⁵ since the action must be brought against the executor or administrator in his “representative” capacity. In other words, this section refers solely to claims presented by creditors of the decedent and matters which constituted a charge against the estate at the time of the death of the deceased. It has no reference to a claim brought into being by the personal acts of the representative or a claim arising solely out of matters independent of the estate of the deceased.⁴⁰⁶ This section exempts the executor or administrator from liability for costs of a successful, though not of an unsuccessful, appeal.⁴⁰⁷

Coming to a consideration of the particular provisions of section 1836, it will be noticed that the Code section provides that the “court may award costs,” but the word “may” is to

⁴⁰² *McBride v. Chamberlain*, 56 State Rep. 431, 26 N. Y. Supp. 94. Judgment in foreclosure for a deficiency, including costs is not a judgment for a “sum of money only.” *Richards v. Stillman*, 57 App. Div. 182, 68 N. Y. Supp. 188.

⁴⁰³ *Fox v. Fox*, 22 How. Pr. 453.

⁴⁰⁴ *Merritt v. Thompson*, 27 N. Y. 225, 234; *Tindal v. Jones*, 11 Abb. Pr. 258, which reviews the conflicting decisions.

⁴⁰⁵ *Smith v. Patten*, 9 Abb. Pr. (N. S.) 205.

⁴⁰⁶ *Dunn v. Arkenburgh*, 48 App. Div. 518, 521, 62 N. Y. Supp. 861.

⁴⁰⁷ *Benjamin v. Ver Nooy*, 168 N. Y. 578, 582, which held that where an executor appealed and secured a new trial with costs to abide event which resulted in a verdict against the executor, affirmed on appeal, he was personally liable for the costs of the appeals and motions for a new trial but not for the costs of the trials.

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be construed as “shall.”⁴⁰⁸ Two things must appear to entitle plaintiff to costs, viz.: First, that the claim was presented; second, that payment was unreasonably neglected or refused “or” that the executor or administrator did not file the consent provided for.⁴⁰⁹

— **Presentation of claim.** Costs cannot be allowed where notice to creditors to present claims has been published, unless the claim was presented within the statutory time, though the court certifies that the claim was unreasonably resisted and neglected; and it makes no difference that the creditor was ignorant of the publication.⁴¹⁰ This rule applies though the claim is that of a surety of decedent which had not become a claim when the notice was published.⁴¹¹ This, however, does not preclude an effective presentation of the claim before the publication of such notice but after the executor or administrator qualifies.⁴¹² And a claim so presented need not be presented again after the publication of the notice for claims.⁴¹³ It is immaterial that the executor neglects to advertise for the presentation of claims;⁴¹⁴ if no notice is published, a claim presented at any time is sufficient.⁴¹⁵ The claim presented must substantially conform to the claim on which a recovery is had,⁴¹⁶ though if a detailed statement is presented it is immaterial that the claim sued on is for a less amount, where the representatives were in no way misled or prejudiced by the amount.⁴¹⁷

— **When claim is unreasonably resisted or neglected.** No general rule can be laid down as to when a claim is “unreason-

⁴⁰⁸ *Carter v. Barnum*, 24 Misc. 220, 53 N. Y. Supp. 539.

⁴⁰⁹ The latter provision is in the alternative. *Ballantyne v. Steenwerth*, 79 App. Div. 632, 80 N. Y. Supp. 37; *Clark v. Corwin*, 60 Hun, 586, 15 N. Y. Supp. 618.

⁴¹⁰ *Clarkson v. Root*, 18 Abb. N. C. 462.

⁴¹¹ *Supplee v. Sayre*, 51 Hun, 30, 3 N. Y. Supp. 627.

⁴¹² *Brinker v. Loomis*, 43 Hun, 247.

⁴¹³ *Field v. Field*, 77 N. Y. 294.

⁴¹⁴ *Snyder v. Young*, 4 How. Pr. 217.

⁴¹⁵ *Brinker v. Loomis*, 43 Hun, 247; *Field v. Field*, 77 N. Y. 294.

⁴¹⁶ *Wallace v. Markham*, 1 Denio, 671, 674; *Knapp v. Curtiss*, 6 Hill, 386.

⁴¹⁷ *Carter v. Beckwith*, 104 N. Y. 236, 239.

ably resisted or neglected.” The recovery of the full amount sued for does not, of itself, show unreasonable resistance or neglect.⁴¹⁸ So a claim cannot be said to be unreasonably resisted where considerably larger than the claim presented to the intestate,⁴¹⁹ nor where the claim is materially reduced.⁴²⁰ So a refusal to pay a claim for services as housekeeper extending over ten years which did not appear to have been presented to the decedent during his lifetime was held not unreasonably resisted where the recovery was less than the claim.⁴²¹ It is not “unreasonable resistance” by an executor, if the claim is barred by the statute of limitations, to require it to be proved in a suit, where the payment claimed to have taken it out of the statute was unknown to the executor.⁴²² So there is no unreasonable resistance or neglect of the claim where the administrator admitted and promised to pay the claim but on

⁴¹⁸ *Ehrenreich v. Lichtenberg*, 29 Misc. 305, 60 N. Y. Supp. 513.

⁴¹⁹ *Harrison v. Ayers*, 18 Hun, 336.

⁴²⁰ *Cruikshank v. Cruikshank*, 9 How. Pr. 350; *Woodin v. Bagley*, 13 Wend. 453; *Comstock v. Olmstead*, 6 How. Pr. 77; *Buckhout v. Hunt*, 16 How. Pr. 407; *Daggett v. Mead*, 11 Abb. N. C. 116; *Miller v. Miller*, 67 How. Pr. 135. A reduction from \$1,000 to \$350 (*Cruikshank v. Cruikshank*), or from \$5,000 to \$3,000 (*Buckhout v. Hunt*), is a material reduction. Reduction of one fifth. *Russell v. Lane*, 1 Barb. 519. Claim reduced from \$1,300 to \$992.50, held materially reduced. *Matter of Raab*, 47 App. Div. 33, 62 N. Y. Supp. 332. So one reduced from \$276 to \$93. *Healy v. Murphy*, 21 Civ. Proc. R. (Browne) 13, 16 N. Y. Supp. 541. So one reduced by half. *Anderson v. McCann*, 14 App. Div. 365, 43 N. Y. Supp. 956. A reduction of \$17 on a claim of \$196 is not such a material reduction as to justify an absolute denial of all liability of the estate for the claim, and costs are properly allowed in such a case against the administrator. *Dukelow v. Searles*, 48 State Rep. 91, 20 N. Y. Supp. 348. A reduction of one fifth in a claim for services, in consequence of a difference of opinion as to value, where there had been a denial of the whole claim, does not relieve from costs. *Fort v. Gooding*, 9 Barb. 388. Where an executor refused to pay a claim for board and necessaries furnished to his testatrix, and upon a reference the amount was reduced nearly one-half, plaintiff was only allowed the fees of the referee and disbursements. *Pinkernelli v. Bischoff*, 2 Abb. N. C. 107.

⁴²¹ *Ryan v. McElroy*, 15 App. Div. 216, 44 N. Y. Supp. 196.

⁴²² *Chesebro v. Hicks*, 66 How. Pr. 194.

being sued before the expiration of the year allowed to pay claims he disputed the claim, it not being shown that he had assets applicable to the payment of the claim.⁴²³ Nor is there an unreasonable resistance where there was good reason to suppose there was a valid defense which would probably have been successful if a certain witness could have been procured.⁴²⁴

— **Failure to file consent.** Prior to 1897 the plaintiff was required to show, to obtain costs, that there was unreasonable resistance or neglect of the claim “or” that defendant “refused to refer” the claim. In 1897 the Code provision was amended and in the place of a refusal to refer was substituted a failure to file, within ten days before the expiration of six months from the rejection of the claim, a consent that the claim be heard and determined by the surrogate on the executor’s accounting. Plaintiff cannot insist, as the ground for an allowance of costs, that the consent was not filed where he brings suit on the claim before the expiration of the time allowed for the filing of the consent, i. e., ten days before the expiration of six months from the rejection thereof.⁴²⁵

— **Procedure.** Formerly it was held that the “court” must impose the costs.⁴²⁶ Since 1893, a referee, on a reference of a disputed claim against the estate of a decedent, has power to award costs and his decision in regard thereto cannot be reviewed at special term.⁴²⁷ That costs were not applied for on motion, but were included in the judgment, is not fatal where the party awarded costs was entitled thereto.⁴²⁸ Where the action is in the supreme court, the facts must be certified

⁴²³ Patterson v. Buchanan, 40 App. Div. 493, 497, 58 N. Y. Supp. 179.

⁴²⁴ Stephenson v. Clark, 12 How. Pr. 282.

⁴²⁵ Hart v. Hart, 45 App. Div. 280, 61 N. Y. Supp. 131; Ballantyne v. Steenwerth, 79 App. Div. 632, 80 N. Y. Supp. 37; Pauley v. Millspaugh, 95 App. Div. 208, 88 N. Y. Supp. 565. Contra, De Kalb Ave. M. E. Church v. Kelk, 30 Misc. 367, 62 N. Y. Supp. 393.

⁴²⁶ Bailey v. Bergen, 5 Hun, 555 (mem.); Morgan v. Skidmore, 3 Abb. N. C. 92, 112.

⁴²⁷ Fisher v. Bennett, 21 Misc. 178, 47 N. Y. Supp. 114; Jenkinson v. Harris, 27 Misc. 714, 59 N. Y. Supp. 548; Brainerd v. De Graef, 29 Misc. 560, 61 N. Y. Supp. 953; Domeyer v. Hoes, 99 App. Div. 294, 90 N. Y. Supp. 1074.

⁴²⁸ Hees v. Nellis, 65 Barb. 440.

by the judge or referee before whom the trial took place.⁴²⁹ Such a certificate is the necessary basis of the award, and without it the facts cannot fully appear. The evidence on the trial and its result may be taken into account, but cannot serve without the prescribed certificate.⁴³⁰ A report that the plaintiff is entitled to recover a certain sum “with the usual costs and disbursements” is not a sufficient certificate.⁴³¹ The certificate need not be incorporated in the decision or report but may be separately made.⁴³² The certificate is not required, however, to enable the party to recover “disbursements”;⁴³³ section 317 of the old Code which provides that on a reference pursuant to statute “the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements to be taxed according to law” is still in force.⁴³⁴ A certificate that the payment of the claim was unreasonably resisted should be set aside on motion where plaintiff afterwards voluntarily consents to a material reduction of his claim.⁴³⁵ The certificate is not conclusive on the appellate court.⁴³⁶

§ 2110. Attorney.

The liability of plaintiff's attorney for costs where defendant is required to give security for costs has already been stated.⁴³⁷ So, as has been stated, an attorney for plaintiff is not liable because of his interest in the action where such interest arises out of an agreement for a portion of the recovery as compensation for his services.⁴³⁸ An attorney who brings an

⁴²⁹ Code Civ. Proc. § 1836.

⁴³⁰ *Matson v. Abbey*, 141 N. Y. 179. To same effect, *Darde v. Conklin*, 73 App. Div. 590, 77 N. Y. Supp. 39; *Matter of Raab*, 47 App. Div. 33, 62 N. Y. Supp. 332; *Sutton v. Newton*, 22 Wkly. Dig. 140.

⁴³¹ *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676.

⁴³² *Brainerd v. De Graef*, 29 Misc. 560, 562, 61 N. Y. Supp. 953.

⁴³³ *Niles v. Crocker*, 88 Hun, 312, 34 N. Y. Supp. 761.

⁴³⁴ *Osborne v. Parker*, 66 App. Div. 277, 283. See, also, *Newton v. Sweet*, 4 How. Pr. 134.

⁴³⁵ *Healy v. Malcolm*, 75 App. Div. 422, 78 N. Y. Supp. 315.

⁴³⁶ *Patterson v. Buchanan*, 40 App. Div. 493, 497, 58 N. Y. Supp. 179.

⁴³⁷ Volume 2, p. 1908.

⁴³⁸ See ante, p. 2948.

action without authority is liable for the costs of the action.⁴³⁹ So if an attorney makes a motion for his own benefit and not for that of his client, the motion costs are properly imposed on him.⁴⁴⁰ So an attorney may be charged with the motion costs where scandalous and impertinent matter is stricken out of a pleading or other paper which he has prepared and filed.⁴⁴¹ So motion costs may be imposed on the attorney for a party as a punishment for improper conduct in making the motion.⁴⁴²

§ 2111. Guardian ad litem of infant plaintiff.

Where costs are awarded against an infant plaintiff, they may be collected, by execution or otherwise, from his guardian ad litem, in like manner as if the latter was the plaintiff.⁴⁴³ The judgment, however, is to be entered in form against the infant for the entire costs of the action.⁴⁴⁴ Under the old Code, payment of the costs could be enforced by attachment, issued by leave of the court, against the person of the guardian.⁴⁴⁵ Payment may now be enforced by execution against the property of the guardian and if such execution is returned unsatisfied then by a body execution if the action is one in which such an execution may issue.⁴⁴⁶ The costs cannot be collected from the guardian by contempt proceedings.⁴⁴⁷ Of course, if, after the commencement of the action, the infant comes of age and assumes the management of the cause, the guardian is not liable for costs.⁴⁴⁸

⁴³⁹ *Attleboro Nat. Bank v. Wendell*, 64 Hun, 208, 19 N. Y. Supp. 45.

⁴⁴⁰ *Eisner v. Hamel*, 6 Hun, 234.

⁴⁴¹ *McVey v. Cantrell*, 8 Hun, 522.

⁴⁴² *Schaughnessy v. Reilly*, 41 How. Pr. 382.

⁴⁴³ Code Civ. Proc. § 3249.

⁴⁴⁴ So held under old Code. *Schoen v. Schlessinger*, 7 Abb. N. C. 399. But see *Imhoff v. Wurtz*, 9 Civ. Proc. R. (Browne) 48.

⁴⁴⁵ Code Pro. § 316; *Miller v. Woodhead*, 52 Hun, 127, 129, 5 N. Y. Supp. 88.

⁴⁴⁶ Leave to issue body execution need not be obtained. *Miller v. Woodhead*, 52 Hun, 127, 5 N. Y. Supp. 88.

⁴⁴⁷ *Pierce v. Lee*, 36 Misc. 865, 74 N. Y. Supp. 927.

⁴⁴⁸ *Sparmann v. Keim*, 6 Abb. N. C. 353.

§ 2112. Municipal corporation for whose benefit action is brought.

In an action or a special proceeding, brought in the name of the people of the state, to recover money or property, or to establish a right or claim for the benefit of a county, city, town, or village, costs shall not be awarded against the people; but, where they are awarded to the defendant, they must be awarded against the body for whose benefit the action or special proceeding was brought.⁴⁴⁹ This Code section has been applied to an action by a game inspector to recover a penalty for violating the game laws,⁴⁵⁰ but has been held not applicable to an action by the state dairy commissioner to recover the penalty for bringing impure milk to a cheese factory.⁴⁵¹ In the last case cited it is stated that the benefit referred to in the statute is one peculiar to the "county, city, town, or village" in its relation to the main object sought to be attained by the prosecution of the action.

§ 2113. Relator where action is brought in name of the people.

Where an action is brought, in the name of the people of the state, upon the relation of a private corporation or individual, as prescribed in section 1986 of the Code, a judgment awarding costs to the defendant must award them against the relator, in the first instance, and against the people only in case an execution issued thereupon against the property of the relator is returned unsatisfied.⁴⁵²

ART. V. AMOUNT AND ITEMS.

(A) SUMS FIXED BY STATUTE.

§ 2114. Code provision and scope of subdivision.

The scope of this article is limited by section 3251 of the

⁴⁴⁹ Code Civ. Proc. § 3243.

⁴⁵⁰ *People v. Alden*, 112 N. Y. 117; *People v. Smith*, 47 State Rep. 170, 20 N. Y. Supp. 332. See, also, *People v. Rosendale*, 76 Hun, 112, 27 N. Y. Supp. 825.

⁴⁵¹ *People v. Hodnett*, 81 Hun, 137, 30 N. Y. Supp. 735.

⁴⁵² Code Civ. Proc. § 3242.

Code which regulates the rates at which costs are to be taxed. Neither such Code provision nor this article has anything to do with the "right" to costs but only with the rate at which they shall be adjusted in certain cases where they may have been awarded. The reference to section 3251 of the Code will not be repeated in connection with each item of costs.

Costs in excess of the amount fixed by the statute cannot be awarded,⁴⁵³ nor can a less sum be allowed.⁴⁵⁴ So items not given by the statute cannot be taxed.⁴⁵⁵

Where costs are allowed in a special proceeding they should be granted at the same rate allowed for similar services in civil actions.⁴⁵⁶

§ 2115. Costs on settlement.

Where an action, specified in section 3228 of the Code, i. e., an action where costs are a matter of course, is settled before judgment, no greater sum shall be demanded as costs than at the rates prescribed by section 3251 of the Code, which section is the one to be construed in this subdivision.⁴⁵⁷

§ 2116. Proceedings before notice of trial.

Plaintiff is entitled to fifteen dollars costs for all proceedings before notice of trial, in an action specified in section 420 of the Code, and twenty-five dollars in every other action. Defendant is entitled to ten dollars for all proceedings before notice of trial except as otherwise prescribed.

The question as to which sum plaintiff is entitled to, for proceedings before notice of trial, depends not on whether the pleadings are such as to render application to the court necessary, but on whether the nature of the action is such that

⁴⁵³ *Matter of Taxpayers & Freeholders of Plattsburgh*, 157 N. Y. 78.

⁴⁵⁴ *Gray v. Hannah*, 3 Abb. Pr. (N. S.) 183.

⁴⁵⁵ *Kenney v. Vanhorne*, 2 Johns. 107; *Downing v. Marshall*, 37 N. Y. 380; *Whitney v. Roe*, 75 Hun, 508, 27 N. Y. Supp. 511.

⁴⁵⁶ *People v. Fire Com'rs of New York*, 5 Abb. N. C. 144; *Byrnes v. Labagh*, 12 Civ. Proc. R. (Browne) 417.

⁴⁵⁷ Code Civ. Proc. § 3260.

judgment, in case of failure to answer, might be had without such application.⁴⁵⁸ The fact that defendant is a receiver and plaintiff has had to obtain leave to sue does not entitle plaintiff to the larger sum.⁴⁵⁹

These costs may be allowed although no recovery is had,⁴⁶⁰ but this item cannot be allowed on sustaining a demurrer with leave to plead anew.⁴⁶¹ Defendant should not be compelled to pay such item as a condition of serving a supplemental answer, where it does not necessitate any change in the complaint.⁴⁶²

A party is not entitled to tax the costs before notice of trial twice in the same action, although there has been more than one trial.⁴⁶³

§ 2117. Service of summons.

Plaintiff is entitled to two dollars for each additional defendant served with the summons, not exceeding ten; and for each necessary defendant, in excess of that number, served with the summons, one dollar. It will be noticed that, in excess of ten, the item is allowed only for each "necessary" defendant. It is held that the objection that unnecessary persons are made parties is not waived, so far as relates to this question of costs, because not urged by demurrer.⁴⁶⁴ A voluntary appearance is held equivalent to personal service of summons in so far as this item of costs is concerned.⁴⁶⁵

⁴⁵⁸ *Van Valkenburgh v. Van Schaick*, 8 How. Pr. 271.

⁴⁵⁹ *Douglass v. Macdurm*, 2 How. Pr. (N. S.) 289.

⁴⁶⁰ *Rockefeller v. Weiderwax*, 3 How. Pr. 382.

⁴⁶¹ *Kneering v. Lennon*, 3 Misc. 247, 22 N. Y. Supp. 775; *Jones v. Butler*, 83 Hun, 91, 31 N. Y. Supp. 401; *Garrett v. Wood*, 23 Misc. 7, 51 N. Y. Supp. 651. The rule would be otherwise if the demurrer was interposed to the entire pleading and the defeated party elected not to amend. *Garrett v. Wood*, 61 App. Div. 294, 70 N. Y. Supp. 359.

⁴⁶² *Brown v. May*, 17 Abb. N. C. 208.

⁴⁶³ *Bank of Mobile v. Phoenix Ins. Co.*, 8 Civ. Proc. R. (Browne) 212.

⁴⁶⁴ *Case v. Price*, 17 How. Pr. 348, 350.

⁴⁶⁵ So held where two defendants were served and twelve appeared. *Schwinger v. Hickox*, 46 How. Pr. 114.

§ 2118. Appointment of guardian ad litem.

Plaintiff is entitled to ten dollars for procuring the appointment of a guardian or guardian ad litem for one or more infant defendants.

§ 2119. Order for service of summons by publication.

Plaintiff is entitled to ten dollars for procuring an order directing the service of summons by publication thereof, or personally, without the state, on one or more defendants.

§ 2120. Injunction order or arrest order.

Plaintiff is entitled to ten dollars for procuring an injunction order or an order of arrest.

§ 2121. Proceedings after notice of trial and before trial.

For all proceedings after notice of trial and before trial, except as otherwise prescribed, either party is entitled to fifteen dollars. The exception noted is where a new trial is had, pursuant to an order granting the same, in which case twenty-five dollars is allowed for all proceedings after the grant of and before the new trial.⁴⁶⁶ These costs contemplate compensation for services rendered in preparing the cause for trial and discharging the incidental duties intermediate the notice and the trial, such as filing the note of issue, searching and watching the calendar, and to compensate for the drawing and service of the notice of trial when one is necessary.⁴⁶⁷ Fifteen dollars is the limit.⁴⁶⁸ This item is not chargeable till the cause has been noticed for trial,⁴⁶⁹ but it is immaterial who notices the cause for trial⁴⁷⁰ provided the cause is actually noticed for trial as to all the parties.⁴⁷¹ In addition to a no-

⁴⁶⁶ Kummer v. Christopher & Tenth St. R. Co., 12 Misc. 387, 33 N. Y. Supp. 581.

⁴⁶⁷ Douglass v. Macdurmid, 2 How. Pr. (N. S.) 289.

⁴⁶⁸ Hudson v. Erie R. Co., 57 App. Div. 98, 68 N. Y. Supp. 28.

⁴⁶⁹ Morrison v. Ide, 4 How. Pr. 304.

⁴⁷⁰ Andrews v. Schnitzler, 48 Super. Ct. (16 J. & S.) 173.

⁴⁷¹ Tillspaugh v. Dick, 8 How. Pr. 33.

tice of trial, a note of issue must be filed to entitle a defendant to these costs on dismissal of the complaint for neglect to prosecute.⁴⁷² This item is allowable where a demurrer is sustained with leave to plead over on payment of the costs of the demurrer.⁴⁷³ Costs after notice of trial cannot be taxed where no issue has been raised.⁴⁷⁴

This item can be allowed but once though the jury disagree on the first trial.⁴⁷⁵ But it has been held that two items of "costs after notice of trial" may be taxed where a case is sent from the short cause to the general calendar after having proceeded for an hour without being concluded.⁴⁷⁶

§ 2122. Taking depositions.

For taking the deposition of a witness or a party, as prescribed in section 870, 871 or 893 of the Code, either party is entitled to ten dollars. No more than ten dollars is allowed though more than one witness is examined.⁴⁷⁷ Such fee is taxable though the plaintiff is nonsuited as to the cause of action to which the deposition relates where he recovers so as to be entitled to the general costs in the action.⁴⁷⁸ So the fee is taxable though the examination is waived,⁴⁷⁹ or though the deposition is taken by stipulation.⁴⁸⁰

§ 2123. Drawing interrogatories.

Either party is entitled to ten dollars for drawing interroga-

⁴⁷² *Gilroy v. Stampfer*, 30 Misc. 830, 61 N. Y. Supp. 924.

⁴⁷³ *Garrett v. Wood*, 61 App. Div. 294, 70 N. Y. Supp. 359.

⁴⁷⁴ *Cohen v. Cohen*, 72 Hun. 393, 25 N. Y. Supp. 387.

⁴⁷⁵ *Seifter v. Brooklyn Heights R. Co.*, 53 App. Div. 443, 446, 65 N. Y. Supp. 1123, which reviews the conflicting decisions. Followed in *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28. It is submitted that the question whether the trial is in a county where a new notice of trial is necessary should be taken into consideration in determining this question.

⁴⁷⁶ *Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106.

⁴⁷⁷, ⁴⁷⁸ *Burns v. Delaware, L. & W. R. Co.*, 135 N. Y. 268.

⁴⁷⁹ *Steiner v. Ainsworth*, 53 How. Pr. 31.

⁴⁸⁰ *Smith v. Servis*, 59 Hun. 552, 13 N. Y. Supp. 941. *Contra*, *Newman v. Greiff*, 3 Civ. Proc. R. (Browne) 362.

tories, to be annexed to a commission, or to letters rogatory, issued as prescribed in section 1838, 1912, 1913, or 3171 of the Code. This item may be allowed though the interrogatories have not been served.⁴⁸¹ However, but one charge of \$10 can be made for all the interrogatories annexed to a commission, although a number of witnesses are named and separate interrogatories drawn for each.⁴⁸² And costs for taking depositions and for drawing interrogatories on a commission for use upon the first trial and which are taxed in the first bill of costs cannot be allowed in taxing the costs of the second trial.⁴⁸³

§ 2124. Trial of an issue of law.

Either party is entitled to twenty dollars for the trial of an issue of law. The argument of a demurrer is the trial of an issue of law.⁴⁸⁴ This item has been allowed on submission of a controversy without action as in effect a trial of the issues of law arising upon the admitted facts.⁴⁸⁵ Where judgment is ordered on a frivolous pleading or demurrer, it is not a trial, but motion costs may be awarded.⁴⁸⁶ Where the judge at a trial reserves for further consideration the question of law arising upon the trial or verdict, and they are subsequently disposed of at special term, the successful party is entitled to this item, although the cause was not placed on the calendar, and was heard on the clerk's minutes, without a case or bill of exceptions.⁴⁸⁷

On the entry of an interlocutory judgment or a demurrer with leave to plead over on the payment of costs, the success-

⁴⁸¹ *Evans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298.

⁴⁸² *O'Brien v. Commercial F. Ins. Co.*, 38 Super. Ct. (6 J. & S.) 4; *Johnson v. Chappell*, 7 Daly, 43.

⁴⁸³ *Bank of Mobile v. Phoenix Ins. Co.*, 8 Civ. Proc. R. (Browne) 212.

⁴⁸⁴ Code Civ. Proc. § 964; *Deyo v. Morss*, 21 Misc. 497, 498, 48 N. Y. Supp. 171; *Van Schaick v. Winne*, 8 How. Pr. 5; *Sutherland v. Tyler*, 11 How. Pr. 251.

⁴⁸⁵ *Neilson v. Mutual Ins. Co.*, 10 Super. Ct. (3 Duer) 683.

⁴⁸⁶ Code Civ. Proc. § 537.

⁴⁸⁷ *Waterbury v. Westervelt*, 5 Super. Ct. (3 Sandf.) 749.

ful party is entitled to tax fifteen dollars for proceedings after notice of trial and before trial, twenty dollars trial fee, and disbursements.⁴⁸⁸

§ 2125. Trial of an issue of fact.

Either party is entitled to thirty dollars for the trial of an issue of fact, or the assessment of damages pursuant to section 194 of the Code: and where the trial necessarily occupies more than two days, ten dollars in addition thereto.

— **What constitutes a trial.** There has been a considerable number of decisions as to what is a trial of an issue of fact which entitles a party to a trial fee.⁴⁸⁹ A trial fee is allowable only where a trial has actually taken place.⁴⁹⁰ An issue must have been actually joined,⁴⁹¹ and hence where defendant does not plead and application to the court was merely for judgment, and proof is taken only to determine whether plaintiff was entitled to it, no trial fee can be taxed.⁴⁹² But if issue has been joined, an inquest taken on the default of a defendant is a trial.⁴⁹³ And the item may be taxed though the jury disagrees.⁴⁹⁴ So there is a trial of an issue of fact

⁴⁸⁸ *Jones v. Butler*, 83 Hun, 91, 31 N. Y. Supp. 401; *Garrett v. Wood*, 61 App. Div. 294, 70 N. Y. Supp. 359. Cases holding that party is entitled to tax costs before notice of trial (*Marsh v. Graham*, 19 Misc. 263, 44 N. Y. Supp. 253; *Doelger v. O'Rourke*, 12 Civ. Proc. R. [Browne] 254) are overruled.

⁴⁸⁹ Decisions under old Code as to what constitutes a trial are still applicable. *Lafond v. Jetzkowitz*, 17 Abb. N. C. 87.

⁴⁹⁰ *Studwell v. Baxter*, 33 Hun, 331.

⁴⁹¹ *Randolph v. Foster*, 3 E. D. Smith, 648. Where, in an action on a note, defendant denied nothing, but served a counterclaim to which plaintiff replied and had judgment on the pleadings for the difference, there was no issue, since nothing alleged by one party was controverted by the other, and therefore there could be no trial entitling the prevailing party to a trial fee. *Pardee v. Schenck*, 11 How. Pr. 500.

⁴⁹² *Cohen v. Cohen*, 72 Hun, 393, 25 N. Y. Supp. 387; *Chapman v. Lemon*, 11 How. Pr. 235.

⁴⁹³ *Wessels v. Carr*, 22 Abb. N. C. 464, 6 N. Y. Supp. 535; *Weiss v. Morrell*, 7 Misc. 541, 28 N. Y. Supp. 61.

⁴⁹⁴ *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28.

where a nonsuit is ordered,⁴⁹⁵ or where the complaint is dismissed on the trial for the failure of plaintiff to appear when the cause was reached on the calendar.⁴⁹⁶ But an application for judgment on account of the frivolousness of a pleading⁴⁹⁷ is not a trial.

If there is a mistrial, the party whose own act causes the mistrial, cannot, where ultimately successful, tax a trial fee for such abortive proceeding,⁴⁹⁸ though the adverse party may where ultimately successful. Thus, when plaintiff is allowed to withdraw a juror without costs, the defendant, if ultimately successful, is entitled to a trial fee.⁴⁹⁹ No trial fee can be allowed if the action is discontinued before it is reached for trial, though the case is on the calendar and ready for trial,⁵⁰⁰ but it is otherwise where the case is actually called for trial.⁵⁰¹ There is no trial where the case is stopped during the hearing and the cause sent to a referee.⁵⁰² Transferring a cause from the special term calendar, to the trial term, on the case being called for trial, does not constitute a trial.⁵⁰³

Proceedings before commissioners to assess damages for land taken by a railroad company do not constitute a trial,⁵⁰⁴ nor

⁴⁹⁵ *Gates v. Canfield*, 28 Hun, 12.

⁴⁹⁶ *Engberman v. North German Lloyd S. S. Co.*, 84 N. Y. Supp. 199, and cases cited; *Dodd v. Curry*, 4 How. Pr. 123; *Sutphen v. Lash*, 10 Hun, 120; *Shannon v. Brower*, 2 Abb. Pr. 377.

⁴⁹⁷ Code Civ. Proc. § 537; *Bell v. Noah*, 24 How. Pr. 478; *Butchers' & Drovers' Bank v. Jacobson*, 22 How. Pr. 470.

⁴⁹⁸ *Finck v. Stachelberg*, 86 N. Y. Supp. 20.

⁴⁹⁹ *Mott v. Consumers' Ice Co.*, 8 Daly, 244; *Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106; *Browning v. Goldman*, 35 Misc. 272, 71 N. Y. Supp. 822.

⁵⁰⁰ *Studwell v. Baxter*, 33 Hun, 331; *Sutphen v. Lash*, 10 Hun, 120; *Oelberman v. Rosenbaum*, 15 Civ. Proc. R. (Browne) 389, 4 N. Y. Supp. 210. See, also, *McComb v. Kellogg*, 13 Civ. Proc. R. (Browne) 150; *Ehlers v. Willis*, 63 How. Pr. 341; *Lockwood v. Salmon River Paper Co.*, 49 State Rep. 302, 20 N. Y. Supp. 967; *Kronsberg v. Mayer*, 20 Civ. Proc. R. (Browne) 80, 15 N. Y. Supp. 328. Contra, *Duperey v. Phoenix*, 1 Abb. N. C. 133, note.

⁵⁰¹ *Jones v. Case*, 38 How. Pr. 349.

⁵⁰² *Third Nat. Bank v. McKinstry*, 2 Hun, 443.

⁵⁰³ *Evans v. Ferguson*, 10 Civ. Proc. R. (Browne) 57.

⁵⁰⁴ *City of Johnstown v. Frederick*, 35 App. Div. 44, 54 N. Y. Supp.

does the hearing on an application for confirmation of a commissioner's report,⁵⁰⁵ nor does a reference to compute in foreclosure,⁵⁰⁶ nor does a reference for admeasurement of dower,⁵⁰⁷ nor do proceedings in foreclosure to obtain surplus monies.⁵⁰⁸

On a stipulation that the judgment should be entered with costs upon the result of another suit "the same as if a trial had been had therein," the successful party is entitled to a trial fee of an issue of fact.⁵⁰⁹

The general answer of an infant raises an issue of fact sufficient for the purposes of the taxation of a trial fee and costs after notice of trial where the answer necessitates plaintiff's proof of his cause of action.⁵¹⁰

—**Number of trial fees.** A trial fee may be taxed for each trial.⁵¹¹ This rule applies notwithstanding two actions are tried under a stipulation that one is to abide the event of the other,⁵¹² or that an action on the short cause calendar is sent to the general calendar before the trial is concluded,⁵¹³ or that there is a trial after the opening of the default or inquest,⁵¹⁴ or that the jury disagreed on the first trial.⁵¹⁵ But

412; *Manhattan R. Co. v. Kent*, 80 Hun, 559, 30 N. Y. Supp. 959. Compare *Matter of Brooklyn Union El. R. Co.*, 176 N. Y. 213.

⁵⁰⁵ *Matter of Lake Shore & M. S. R. Co.*, 65 Hun, 538, 20 N. Y. Supp. 573.

⁵⁰⁶ *Tully v. Eastburn*, 1 Month. Law Bul. 74.

⁵⁰⁷ *Price v. Price*, 41 State Rep. 399, 16 N. Y. Supp. 359.

⁵⁰⁸ *McDermott v. Hennessy*, 9 Hun, 59; *Dudgeon v. Smith*, 23 Wkly. Dig. 400.

⁵⁰⁹ *Audenreid v. Wilson*, 2 Wkly. Dig. 108.

⁵¹⁰ *Roosevelt v. Schermerhorn*, 32 Misc. 287, 66 N. Y. Supp. 366.

⁵¹¹ *Lafond v. Jetzkowitz*, 17 Abb. N. C. 87. It is immaterial that first trial was before a judge disqualified to sit. *Cregin v. Brooklyn Crosstown R. Co.*, 19 Hun, 349.

⁵¹² *Koch v. Koch*, 1 City Ct. R. 255.

⁵¹³ *Gilroy v. Badger*, 28 Misc. 143, 58 N. Y. Supp. 1106.

⁵¹⁴ *Candee v. Jones*, 13 Civ. Proc. R. (Browne) 160; *Lennon v. MacIntosh*, 19 Abb. N. C. 175; *Jacob Hoffman Brew. Co. v. Volpe*, 4 Misc. 260, 53 State Rep. 179, 23 N. Y. Supp. 812; *Baker v. McMullen*, 28 Misc. 128, 58 N. Y. Supp. 1086. Where an action is dismissed when called for trial upon failure of plaintiff to appear and the default is subse-

a party cannot tax two trial fees where he is responsible for the first trial being abortive.⁵¹⁶ So, plaintiff is entitled to but one trial fee where at the trial before impaneling a jury the court heard argument for judgment on the pleadings, and after the jury had been discharged for the term the court denied the motion and directed the trial to proceed.⁵¹⁷ So, where the cause is placed on the calendar on terms and discontinued just as it is about to be called, a second trial fee is not allowable.⁵¹⁸ And a defendant who has paid a trial fee as condition of being allowed to withdraw a juror, cannot, on judgment being subsequently rendered against him, be required to again pay such fee.⁵¹⁹

— **When trial occupies more than two days.** Ten dollars additional may be taxed as a trial fee where the trial “necessarily” occupies more than two days. In determining whether the trial occupies more than two days, the better rule seems to be that fractions of a day are not to be counted. Thus, where the trial is commenced on one day, continued on the next, on which day plaintiff rested, and dismissed at the opening of court on the third day, the trial occupies more than two days.⁵²⁰ To the contrary, however, it has been held that where the proofs are closed and the case finally submitted to the court, referee or jury within forty-eight hours from the commencement of the trial, although the trial occupied fractions of three separate days, the extra ten dollars cannot be al-

quently opened without terms and at a later term a trial is had which results in a dismissal of the complaint, the defendant is entitled to tax two trial fees. *Cole v. Lowry*, 23 Civ. Proc. R. (Browne) 113, 23 N. Y. Supp. 674.

⁵¹⁵ *Hamilton v. Butler*, 19 Abb. Pr. 446, 30 How. Pr. 36, 27 Super. Ct. (4 Rob.) 654; *Spring v. Day*, 44 How. Pr. 390.

⁵¹⁶ So held where complaint was dismissed on plaintiff's failure to appear and plaintiff subsequently succeeded on the merits. *Engberman v. North German Lloyd S. S. Co.*, 84 N. Y. Supp. 199.

⁵¹⁷ *Pach v. Gilbert*, 29 State Rep. 833, 9 N. Y. Supp. 546.

⁵¹⁸ *Sutphen v. Lash*, 10 Hun, 120.

⁵¹⁹ *Byrne v. Brooklyn City & N. R. Co.*, 6 Misc. 6, 26 N. Y. Supp. 65.

⁵²⁰ *Mott v. Consumers' Ice Co.*, 8 Daly, 244.

lowed.⁵²¹ Where a case is tried and summed up within two days, the fact that counsel are given additional time to submit briefs, does not make the trial occupy more than two days.⁵²²

§ 2126. Making and serving case.

Twenty dollars is allowed either party for making and serving a case; and when the case necessarily contains more than fifty folios, ten dollars in addition thereto.

§ 2127. Making and serving amendments to a case.

For making and serving amendments to a case, either party is allowed twenty dollars.

§ 2128. Motion for new trial or application for judgment on special verdict.

Upon a motion for a new trial, upon a case, or an application for judgment upon a special verdict, either party is entitled to the same sums as upon an appeal, i. e., twenty dollars before argument and forty dollars for argument and ten dollars for each term, not exceeding five, at which the cause is necessarily on the calendar excluding the term at which it is argued or otherwise finally disposed of.⁵²³ It will be noticed that this applies only to a motion for a new trial "on a case." Hence, where a motion is made on the judge's minutes only motion costs are allowable.⁵²⁴ The more reasonable rule seems to be that where the motion is based on a case, whether or not a case is "necessary," costs as on an appeal

⁵²¹ Washburne v. Oliver, 62 How. Pr. 482.

⁵²² Evans v. Ferguson, 10 Civ. Proc. R. (Browne) 57. Compare, however, Mygatt v. Wilcox, 35 How. Pr. 410.

⁵²³ Term fee, Mechanics' Banking Ass'n v. Kiersted, 10 How. Pr. 400, 11 Super. Ct. (4 Duer) 639; Malam v. Simpson, 12 Abb. Pr. 225, 20 How. Pr. 488.

⁵²⁴ Newman v. French, 45 Hun, 65; Naugatuck Cutlery Co. v. Rowe, 5 Abb. N. C. 142.

should be allowed.⁵²⁵ A motion is made “on a case” where made “on the settled case herein” and on affidavits and papers theretofore served.⁵²⁶ A motion based on newly-discovered evidence is made on a case.⁵²⁷ It seems that if the motion is made after the time to appeal from the judgment has expired, only motion costs can be allowed.⁵²⁸

There is not “an application for judgment on a special verdict,” within this provision, where judgment is entered by direction of the trial judge immediately on the rendition of the special verdict.⁵²⁹

A second argument fee is allowable where there is a reargument the necessity for which is not caused by any act or omission of the prevailing party.⁵³⁰

§ 2129. Motions and references.

Upon any other motion, or upon a reference made pursuant to section 623, 624, 827, or 1015 of the Code, to each party to whom costs are awarded, a sum fixed by the court or judge, not exceeding ten dollars, besides necessary disbursements for printing and referee’s fees, is allowable to either party. The phrase “to each party to whom costs are awarded” changes the rule that the entire costs on a motion are limited to ten dollars.

§ 2130. Proceedings before new trial.

Where a new trial is had, pursuant to an order granting the

⁵²⁵ See *Reid v. Gaedeke*, 38 App. Div. 107, 57 N. Y. Supp. 414. Compare, contra, *Hosley v. Colerick*, 9 Civ. Proc. R. (Browne) 43.

⁵²⁶ *Perkins v. Brainard Quarry Co.*, 11 Misc. 337, 32 N. Y. Supp. 236.

⁵²⁷ *Davis v. Grand Rapids F. Ins. Co.*, 5 App. Div. 36, 39 N. Y. Supp. 71.

⁵²⁸ *Forstman v. Shulting*, 38 Hun, 482.

⁵²⁹ *Kenney v. First Nat. Bank of Pittsburgh*, 8 Civ. Proc. R. (Browne) 398. See, also, *Walsh v. Bowery Sav. Bank*, 10 Civ. Proc. R. (Browne) 32. Application for judgment on a referee’s report in divorce is not an application for judgment on a special verdict. *Sparrowhawk v. Sparrowhawk*, 11 Hun, 528.

⁵³⁰ *Gückenheimer v. Angevine*, 16 Hun, 453.

same, or an assessment of damages pursuant to section 194 of the Code, for all proceedings after the granting of, and before the new trial, or the assessment of damages, twenty-five dollars. This does not apply, however, to a new trial after the jury disagree,⁵³¹ nor to a trial after the opening of an inquest,⁵³² nor to a statutory new trial in ejectment,⁵³³ but it would seem that it does apply where a new trial is directed on reversal on appeal.⁵³⁴ An order restoring the cause to the day calendar for trial at a subsequent term, after the withdrawal of a juror, is not an "order for a new trial."⁵³⁵ This item may be taxed on every new trial without regard to the number thereof.⁵³⁶ When this item is taxed, the item of fifteen dollars for costs after notice of trial cannot be allowed.⁵³⁷

§ 2131. Term fees.

For one term of the city court of the city of New York, at which the cause is necessarily on the calendar, and for each trial or special term of the supreme court or a county court not exceeding five, at which the cause is necessarily on the calendar, excluding the term at which it is tried, or otherwise finally disposed of, the prevailing party is entitled to ten dollars. The old Code allowed ten dollars to the prevailing party by way of indemnity for his expenses, "for every circuit at which the cause is necessarily on the calendar and not reached, or is postponed." A term fee is given to compensate the labor and expense of preparing for trial and it ought never to be denied to the successful party where there is no reason to doubt that the preparation was made, and without his fault

⁵³¹ *Hamilton v. Butler*, 27 Super. Ct. (4 Rob.) 654, 30 How. Pr. 36, 19 Abb. Pr. 446.

⁵³² *Wessels v. Carr*, 22 Abb. N. C. 464, 6 N. Y. Supp. 535.

⁵³³ *Carnes v. Platt*, 40 Super. Ct. (8 J. & S.) 205.

⁵³⁴ *Van Gelder v. Hallenbeck*, 15 Civ. Proc. R. (Browne) 333, 2 N. Y. Supp. 252.

⁵³⁵ *Bloch v. Linsley*, 40 Misc. 184, 81 N. Y. Supp. 661.

⁵³⁶ *Faber v. Van Tassell*, 4 Month. Law Bul. 30.

⁵³⁷ *Kummer v. Christopher & Tenth St. R. Co.*, 12 Misc. 387, 33 N. Y. Supp. 581.

a trial prevented.⁵³⁸ A term fee may be taxed for every term that a motion for a new trial on a case is necessarily on the special term calendar.⁵³⁹ The cause must be on the calendar as between all the parties including the party to be charged with the costs.⁵⁴⁰

—When cause is “necessarily” on the calendar. The Code provides for term fees for terms at which the cause is “necessarily” on the calendar. A cause is “necessarily” upon the calendar when regularly and properly placed there,⁵⁴¹ i. e., when it is at issue as to all the parties,⁵⁴² and in readiness for trial.⁵⁴³ A cause is not on the calendar unless a note of issue is served.⁵⁴⁴ A party who has noticed a cause for several terms is estopped from denying that it was necessarily on the calendar for those terms.⁵⁴⁵ The case is necessarily on the calendar though the judge declines to try the case on the day fixed whereupon neither party appears.⁵⁴⁶ Term fees are allowable where the cause is not reached on the day set down for or on any following day of the term.⁵⁴⁷ Term fees are allowed for terms during which the cause has been placed on the general calendar though it has not appeared on the day calendar.⁵⁴⁸ A cause is not necessarily put on the calendar after defendant has been notified that no further proceedings will be taken in the cause.⁵⁴⁹ So, after settlement, a cause is not necessarily on the calendar.⁵⁵⁰ And a cause is not neces-

⁵³⁸ Ormsby v. Babcock, 11 Super. Ct. (4 Duer) 680.

⁵³⁹ Malan v. Simpson, 20 How. Pr. 488.

⁵⁴⁰ Tillspaugh v. Dick, 8 How. Pr. 33.

⁵⁴¹ Sipperly v. Warner, 9 How. Pr. 332.

⁵⁴² Bowen v. Sweeny, 66 Hun, 42, 46; Livingston v. Vielle Montagne Zinc Min. Co., 2 Abb. Pr. 255, 11 Super. Ct. (4 Duer) 681.

⁵⁴³ Deyo v. Morss, 21 Misc. 497, 48 N. Y. Supp. 171.

⁵⁴⁴ Gowing v. Levy, 22 Civ. Proc. R. (Browne) 10, 17 N. Y. Supp. 771.

⁵⁴⁵ Stanswood v. Benson, 2 Month. Law Bul. 39.

⁵⁴⁶ Crim v. Drain, 64 App. Div. 581, 72 N. Y. Supp. 298.

⁵⁴⁷ Ormsby v. Babcock, 11 Super. Ct. (4 Duer) 680.

⁵⁴⁸ Kahn v. Coen, 62 State Rep. 107, 31 Abb. N. C. 478, 30 N. Y. Supp. 347; Flint v. Green, N. Y. Daily Reg. April 19, 1884.

⁵⁴⁹ Jennings v. Fay, 1 Code R. (N. S.) 231.

⁵⁵⁰ Latham v. Bliss, 13 How. Pr. 416.

sarily on the calendar where judgment is obtained for frivolousness of a pleading.⁵⁵¹ A cause is not necessarily on the calendar during a stay of proceedings procured by the opposing party,⁵⁵² nor when the action has been discontinued.⁵⁵³ Where a case is discontinued at the first term at which the case has been on the calendar, on the payment of the taxable costs, no term fee is taxable.⁵⁵⁴

The cause is not "necessarily" on the calendar after it is referred.⁵⁵⁵ And where a cause is referred by order, against the consent of the opposing party, before it is reached on the calendar, no term fee for the term at which the cause is on the calendar can be allowed.⁵⁵⁶

Where a party, at his own request, postpones a cause, he cannot, on subsequently recovering a verdict in his favor, tax a term fee for that term;⁵⁵⁷ but mutual consent to the cause going over a term for which it was necessarily on the calendar will not defeat the right of the successful party to term fees for that term.⁵⁵⁸ It has been held, however, that a term fee should not be allowed for a term of the circuit at which a cause is called and by stipulation of the parties adjourned for trial at a subsequent special term.⁵⁵⁹ And a plaintiff who has noticed the cause for trial for the circuit, but has not moved the same to trial by reason of which it has been reached and passed, is not entitled to tax a term fee for such term.⁵⁶⁰

Term fees are not allowable for terms during which the

⁵⁵¹ *Candee v. Ogilvie*, 12 Super. Ct. (5 Duer) 658.

⁵⁵² *Shufelt v. Power*, 13 How. Pr. 89; *Shepard v. Hoit*, 7 Hill, 198. Compare *Simpson v. Rowan*, 13 Civ. Proc. R. (Browne) 206.

⁵⁵³ It is immaterial that discontinuance was after service of notice of trial. *Drew v. Comstock*, 17 How. Pr. 469.

⁵⁵⁴ *Evans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298.

⁵⁵⁵ *Anon.*, 8 Super. Ct. (1 Duer) 651.

⁵⁵⁶ *Perry v. Livingston*, 6 How. Pr. 404; *Sipperly v. Warner*, 9 How. Pr. 332. Otherwise where reference is by consent. *Id.*

⁵⁵⁷ *Gay v. Seibold*, 3 Civ. Proc. R. (Browne) 169.

⁵⁵⁸ *Deyo v. Morss*, 21 Misc. 497, 48 N. Y. Supp. 171. So held under the old Code. *Fisher v. Hunter*, 15 How. Pr. 156. Compare, as contra, *Crawford v. Kelly*, 23 Super. Ct. (10 Bosw.) 697.

⁵⁵⁹ *Evans v. Ferguson*, 10 Civ. Proc. R. (Browne) 57.

⁵⁶⁰ *Carroll v. Watters*, 10 Civ. Proc. R. (Browne) 6.

cause was on the calendar prior to an amendment of the complaint which destroyed the old issue.⁵⁶¹

A party does not lose the right to term fees by his omission to notice the cause for trial.⁵⁶² Term fees are allowable where either party gives notice of trial and then fails to countermand such notice or try the case pursuant to his notice.⁵⁶³

If one party properly notices the cause for trial at one term and the other party improperly notices the cause for trial at another term, only one term fee will be allowed.⁵⁶⁴

—**Number of term fees.** Only five term fees can be allowed, even where, after they had accrued, a new trial became necessary, and the cause was again on the calendar;⁵⁶⁵ but the attorneys, by stipulating to let term fees abide the event, may waive the limit fixed by the statute to the number of term fees recoverable.⁵⁶⁶

§ 2132. Applications to appellate division.

On an application to the appellate division for a new trial, or for judgment on a verdict rendered subject to the opinion of the court, or where exceptions are ordered to be heard in the first instance by the appellate division:

Before argument, twenty dollars.

For argument, forty dollars.

For each term, not exceeding five, of the appellate division, at which the cause is necessarily on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

§ 2133. Costs once paid as condition of granting a favor.

Notwithstanding a conflict in the earlier decisions, it is now

⁵⁶¹ Herzfeld v. Reinach, 26 Misc. 489, 57 N. Y. Supp. 669.

⁵⁶² Andrews v. Schnitzler, 48 Super. Ct. (16 J. & S.) 173, 2 Civ. Proc. R. (Browne) 18; Vandever v. Warren, 11 Civ. Proc. R. (Browne) 319.

⁵⁶³ Seifert v. Schillner, 62 How. Pr. 496.

⁵⁶⁴ Wilson v. Allen, 4 How. Pr. 54, 59.

⁵⁶⁵ Hamilton v. Butler, 19 Abb. Pr. 446, 30 How. Pr. 36, 27 Super. Ct. (4 Rob.) 654.

⁵⁶⁶ Emmons v. New York & E. R. Co., 17 How. Pr. 490.

well settled that if costs are paid by a party as a condition of granting a favor and such party is ultimately defeated such costs cannot be again taxed against him,⁵⁶⁷ while on the other hand if he is successful he cannot tax the items so paid.⁵⁶⁸

(B) DISBURSEMENTS.

§ 2134. Code provision and general considerations.

Section 3256 of the Code enumerates the fees and expenses which may be taxed as disbursements and includes generally "such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of the law." This Code section is the only one relating to disbursements. It is exclusive so that a charge not embraced therein cannot be taxed as a disbursement.⁵⁶⁹ The right to disbursements is incident to the right to costs, and they cannot be recovered where costs cannot.⁵⁷⁰ In a case where the costs cannot exceed the recovery, disbursements in excess of that amount cannot be taxed.⁵⁷¹ Prospective dis-

⁵⁶⁷ *Cahill v. City of New York*, 50 App. Div. 276, 63 N. Y. Supp. 1006; *Marx v. Gross*, 2 Misc. 500, 22 N. Y. Supp. 387; *Byrne v. Brooklyn City & N. R. Co.*, 6 Misc. 6, 26 N. Y. Supp. 65; *Seymour v. Ashenden*, 13 Civ. Proc. R. (Browne) 255. See note in 7 Ann. Cas. pp. 320-328.

⁵⁶⁸ *Woolsey v. Trustees of Ellenville*, 84 Hun, 234, 65 State Rep. 746, 32 N. Y. Supp. 546; *Skinner v. White*, 69 Hun, 127, 52 State Rep. 737, 23 N. Y. Supp. 384; *Provost v. Farrell*, 13 Hun, 303; *Linacre v. Lush*, 3 Wend. 305. But see, as contra, *Ireland v. Harlam*, 88 N. Y. Supp. 990.

⁵⁶⁹ *Moore v. Cockcroft*, 9 How. Pr. 479; *Hanel v. Baare*, 22 Super. Ct. (9 Bosw.) 682. Charge for copying notices of mechanic's lien and of the report and opinion of the referee in a lien suit, are not taxable disbursements, not being given by the Code. *Wright v. Reusens*, 39 State Rep. 802, 60 Hun, 585, 15 N. Y. Supp. 504.

⁵⁷⁰ *Belding v. Conklin*, 4 How. Pr. 196, 2 Code R. 112; *Wheeler v. Westgate*, 4 How. Pr. 269; *Peët v. Warth*, 14 Super. Ct. (1 Bosw.) 653; *Rust v. Hauselt*, 8 Abb. N. C. 148, 59 How. Pr. 389, 46 Super. Ct. (14 J. & S.) 38. Under the statute making presentation of claim to chief fiscal officer a prerequisite to the recovery of costs, the costs referred to include disbursements. *Judson v. Village of Olean*, 40 Hun, 158.

⁵⁷¹ *Marsullo v. Billotto*, 55 How. Pr. 375; *Warren v. Chase*, 8 Misc. 520, 28 N. Y. Supp. 765.

bursements cannot be allowed,⁵⁷² except such as must necessarily be incurred for the fees of officers which are fixed by law.⁵⁷³ Formerly disbursements were strictly confined to expenses incurred by counsel and did not include expenses of the party but much more latitude is allowed under the Codes. A “necessary” disbursement has been defined as one the party is compelled to make or incur, incident to the regular proceedings in the action, and to bring it to trial according to the course and practice of the court.⁵⁷⁴ A legal disbursement to establish a separate cause of action in which the party fails cannot be held unnecessary because of such failure, where the party recovers on another cause of action so as to be entitled to costs and disbursements.⁵⁷⁵ Moneys paid out in reliance on a statute afterwards declared unconstitutional are not necessary disbursements.⁵⁷⁶ A sum paid to a surety company for furnishing the undertaking upon which the goods were seized in replevin cannot be taxed.⁵⁷⁷

§ 2135. Witness fees.

The legal fees of witnesses are taxable as a disbursement.

— **Where witness attends without a subpoena.** The fees and mileage of witnesses who attended, though not subpoenaed, are chargeable;⁵⁷⁸ but it is the duty of the clerk allowing witness fees to see that their attendance was procured in good faith.⁵⁷⁹

— **Where witness does not attend.** Witness fees paid on serving a subpoena may be taxed for a witness who does not attend where he has a good excuse such as the settlement or

⁵⁷² *Pearson v. Cole*, 22 Wend. 652.

⁵⁷³ *Crippen v. Brown*, 11 Paige, 628.

⁵⁷⁴ *Delcomyn v. Chamberlain*, 48 How. Pr. 411.

⁵⁷⁵ *Burns v. Delaware, L. & W. R. Co.*, 135 N. Y. 268, 274.

⁵⁷⁶ *Kohn v. Manhattan R. Co.*, 8 Misc. 421, 28 N. Y. Supp. 663.

⁵⁷⁷ *Bick v. Reese*, 52 Hun, 125, 5 N. Y. Supp. 121.

⁵⁷⁸ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444; *Vence v. Speir*, 18 How. Pr. 168.

⁵⁷⁹ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

postponing of the cause,⁵⁵⁰ or where, after going a part of the distance, he returned home because informed that the court would not be held.⁵⁵¹ So fees of a witness who, for a good cause, was not subpoenaed till late, and who arrived at court after the cause was postponed, but in time to have been sworn had it been tried, are taxable.⁵⁵² In short, if the party cannot recover back from the witness the fees paid to him, such fees may be taxed as a disbursement.

— **Where witness departs before trial.** If it is shown that the witnesses left the place of trial before the trial, by consent of the party, the witnesses should not be regarded as material, unless they were permitted to depart on account of some admission or concession of the other side, which rendered their evidence unnecessary, or some other fact be shown, proving the supposed necessity of their attendance at all.⁵⁵³

— **Where witness attends at a term at which trial could not be had.** Fees for plaintiff's witnesses summoned for a term for which he should have known that his cause was not ready for trial cannot be charged.⁵⁵⁴ So where his attorney should have known that the case would be referred at that term, such fees cannot be taxed.⁵⁵⁵ But a plaintiff ultimately successful may tax the witnesses' fees for the term when a default was taken against him though he was obliged to pay the costs of that term to the defendant as a condition of being allowed to open the default.⁵⁵⁶

— **Where witness does not testify.** The fees of a witness who is in attendance but does not testify may be taxed only where it is shown what was expected to be proven by him and a satisfactory reason why he was not called.⁵⁵⁷ Thus, fees for

⁵⁵⁰ *Ford v. Monroe*, 6 How. Pr. 204, 10 N. Y. Leg. Obs. 155. See, also, *Inderlied v. Whaley*, 17 Civ. Proc. R. (Browne) 377, 7 N. Y. Supp. 74.

⁵⁵¹ *Roth v. Meads*, 20 How. Pr. 287.

⁵⁵² *Clarks v. Staring*, 4 How. Pr. 243.

⁵⁵³ *Dowling v. Bush*, 6 How. Pr. 410.

⁵⁵⁴ *Kohn v. Manhattan R. Co.*, 8 Misc. 421, 28 N. Y. Supp. 663.

⁵⁵⁵ *Pike v. Nash*, 16 How. Pr. 53.

⁵⁵⁶ *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28.

⁵⁵⁷ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444. Presumptively a

witnesses only wanted in anticipation of impeaching an expected adverse witness are not taxable, unless it is shown that they would have impeached such adverse witness had they been sworn.⁵⁸⁸ It follows that the fees of witnesses subpoenaed and in attendance as such are taxable although by reason of the dismissal of the cause or the direction of a verdict on admissions of the party they were not called to testify.⁵⁸⁹ Fees are not allowed for attendance of the county clerk when not sworn as a witness nor producing any paper or document for the party.⁵⁹⁰

Where a large number of witnesses are subpoenaed to testify on a certain point and the court limits the number allowed to testify, it would seem that the question whether the fees of all can be taxed depends on the reasonableness and apparent necessity of subpoenaing the number in excess of those allowed to testify.⁵⁹¹ Only the fees of witnesses considered material and necessary by prudent counsel will be taxed.⁵⁹²

— **Where witness is attorney or party.** A party to an action or a special proceeding is not entitled to a fee, for attending as a witness therein, in his own behalf, or in behalf of a

witness not sworn is not a necessary witness. *Kohn v. Manhattan R. Co.*, 8 Misc. 421, 28 N. Y. Supp. 663.

⁵⁸⁸ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

⁵⁸⁹ *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 74 Hun, 539, 26 N. Y. Supp. 829.

⁵⁹⁰ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

⁵⁹¹ Where defendant subpoenaed seventeen witnesses upon an issue previously found against him on a former trial when he had examined twelve, but the court in the present trial allowed him to examine five of the seventeen only, he was allowed to tax witness fees for all the seventeen. *Lowerre v. Vail*, 5 Abb. Pr. 229. When complaint was dismissed at the trial as not setting forth a cause of action, and defendant had, in good faith, summoned thirty-three witnesses to impeach plaintiff's character, none being examined, the fees of only five of such witnesses were taxed. *Kley v. Healey*, 2 N. Y. Supp. 231, 18 State Rep. 174. Where forty witnesses attended to support plaintiff's general character only two of whom were sworn on the trial, the court directed that fees should be taxed for but ten witnesses. *Irwin v. Deyo*, 2 Wend. 285.

⁵⁹² *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

party who pleads jointly, or is united in interest with him; and an attorney or counsel, in an action or a special proceeding, is not entitled to a fee, for attending as a witness therein, in behalf of his client.⁵⁹³ If, however, a party is subpoenaed by his adversary, he is entitled to his fees.⁵⁹⁴

— **Where witness attends in behalf of different parties.** Where separate defendants are entitled to separate bills of costs, only single witness fees can be taxed for the same witness, unless affidavits are produced showing that the witness was subpoenaed by both defendants; or if subpoenaed by neither, then that he was requested to attend by both, and attended on such joint request.⁵⁹⁵

— **Where witness is subpoenaed in two or more cases.** Witness fees are chargeable in each cause though the same witness is subpoenaed in several actions brought by the same plaintiff and pending at the same time.⁵⁹⁶ But where cross actions involving the same subject-matter are both referred to the same referee and but one trial had, the witness fees can be taxed in only one action.⁵⁹⁷

— **Number of days' attendance.** Fifty cents a day is allowed for each day a witness attends.⁵⁹⁸ But if a cause is put off several days on the request of a party, he can only tax witness fees for one day.⁵⁹⁹ Attendance when the cause was on the day calendar, although not reached, and when the cause

⁵⁹³ Code Civ. Proc. § 3288. Attorney. *Crummer v. Huff*, 1 Wend. 24; *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444; *Reynolds v. Warner*, 7 Hill, 144.

⁵⁹⁴ *Hewlett v. Brown*, 14 Super. Ct. (1 Bosw.) 655, 7 Abb. Pr. 74. But one is not entitled to fees as a witness of his adversary for testifying in his own behalf, though he makes an affidavit that he would not have attended the trial but for the purpose of being such witness. *Steere v. Miller*, 28 How. Pr. 266.

⁵⁹⁵ *Taaks v. Schmidt*, 25 How. Pr. 340.

⁵⁹⁶ *Vence v. Speir*, 18 How. Pr. 168; *Willink v. Reckle*, 19 Wend. 82. See, as to mileage fees, *Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220, 56 N. Y. Supp. 712.

⁵⁹⁷ *Sanders v. Failing*, 3 T. & C. 64. See, as contra, *Wilder v. Wheeler*, 1 How. Pr. 136.

⁵⁹⁸ Code Civ. Proc. § 3318.

⁵⁹⁹ *Titus v. Bullen*, 6 Wend. 562.

was reached and partly tried, and when the cause was tried, are all necessary attendances for which the witness fees may be taxed.⁶⁰⁰ Witnesses residing at the place of the court, and only coming in as wanted, are not entitled to fees for days not actually in attendance in the court house as witnesses.⁶⁰¹ The attendance of such witnesses where a day calendar is published is presumptively unnecessary, except upon the days the cause appears on the day calendar,⁶⁰² but the rule is otherwise where the witness lives at such a distance as not to permit his returning to his home every day.⁶⁰³ The fact that a trial closes so late that some of the witnesses are obliged to remain over until the following day does not entitle parties subpoenaing them to claim fees for the extra day's attendance.⁶⁰⁴ If a Sunday intervenes during the trial, the fee for that day may be taxed.⁶⁰⁵ Where witnesses are brought from another state, the time of their attendance is computed from the time they enter the boundaries of the state to the time they depart from the boundaries.⁶⁰⁶

— **Travel fees.** If the witness resides more than three miles from the place of attendance, he is entitled to eight cents for each mile going to the place of attendance.⁶⁰⁷ Travel fees cannot be taxed unless actual travel is shown by affidavit.⁶⁰⁸ Travel fees are not ordinarily allowed for a witness residing where the court is held,⁶⁰⁹ nor for a foreign witness subpoenaed at the place of trial.⁶¹⁰ If a witness is subpoenaed at a place where he is found during a temporary absence from his permanent place of residence, mileage fees cannot be allowed un-

⁶⁰⁰ *Wheeler v. Ruckman*, 28 Super. Ct. (5 Rob.) 702.

⁶⁰¹ *Agricultural Ins. Co. v. Bean*, 45 How. Pr. 444.

⁶⁰² *Allen v. Mahon*, 1 Abb. N. C. 468.

⁶⁰³ *Wheeler v. Ruckman*, 28 Super. Ct. (5 Rob.) 702.

⁶⁰⁴ *Evans v. Ferguson*, 10 Civ. Proc. R. (Browne) 57.

⁶⁰⁵ *Muscott v. Runge*, 27 How. Pr. 85, 90, 96.

⁶⁰⁶ *Howland v. Lenox*, 4 Johns. 311.

⁶⁰⁷ Code Civ. Proc. § 3318.

⁶⁰⁸ *Shufelt v. Rowley*, 4 Cow. 58; *Wheeler v. Ruckman*, 28 Super. Ct. (5 Rob.) 702.

⁶⁰⁹ *Jackson v. Hoagland*, 1 Wend. 69.

⁶¹⁰ *Bank of Niagara v. Austin*, 6 Wend. 548.

less it is affirmatively shown that he returned to the place of trial solely for the purpose of attending as a witness.⁶¹¹ But if, after such facts are shown, it is claimed that the party was in fault and guilty of negligence, in omitting to serve the subpoena before the witness left his home, the party resisting the allowance must show the facts.⁶¹² If a witness, about to return home, is served when nearer to the court house than his home is, traveling fees are properly allowed from his residence.⁶¹³ If the witness attended without a subpoena it must be shown that he came for the sole purpose of being a witness.⁶¹⁴ If the witness resides outside the state, the traveling fees are to be estimated from the boundary of the state.⁶¹⁵

Earlier cases held that a witness is entitled to mileage, going and returning, where the case is postponed,⁶¹⁶ or where a Sunday intervenes and the witness is not paid his per diem for remaining over Sunday,⁶¹⁷ but a later case holds that a party is entitled to tax mileage for but one attendance.⁶¹⁸

—**Payment of fees as condition precedent.** Since, if a witness attends either by virtue of a subpoena or by special request, a liability to pay his legal fees attaches, it is no objec-

⁶¹¹ *Sargent v. Warren*, 41 Hun, 103. See, also, *Mead v. Mallory*, 27 How. Pr. 32; *Clarks v. Staring*, 4 How. Pr. 243; *Mitchell v. Westervelt*, 6 How. Pr. 265.

⁶¹² *Pfandler Barm Extracting Bunging Apparatus Co. v. Pfandler*, 39 Hun, 191.

⁶¹³ *Pike v. Nash*, 16 How. Pr. 53.

⁶¹⁴ *Taaks v. Schmidt*, 25 How. Pr. 340.

⁶¹⁵ *Hinds v. Schenectady County Mut. Ins. Co.*, 7 How. Pr. 142; *Howland v. Lenox*, 4 Johns. 311. To tax fees paid to witnesses attending from other states, the party must prove, by affidavit, the residence of the witness, that he traveled from thence to the place of trial for the purpose of attending as such, and that he was material and necessary. The charge should be for the number of miles from the state line, by the nearest usually traveled route from the witness' residence. The point where such route crosses the state line should be stated. *Hicks v. Brennan*, 10 Abb. Pr. 304.

⁶¹⁶ *Miller v. Huntington*, 1 How. Pr. 218; *Moulton v. Townshend*, 16 How. Pr. 306.

⁶¹⁷ *Muscott v. Runge*, 27 How. Pr. 85.

⁶¹⁸ *Hoffman v. New York, L. E. & W. R. Co.*, 50 Super. Ct. (18 J. & S.) 512.

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tion to the taxation of such fees that it does not appear that the plaintiff has paid or become liable to pay them.⁶¹⁹ But where the witnesses, for whom fees and mileage are charged are officers of a corporation which is a party, the affidavit must show not only that the witnesses have attended but that the fees have been or will be paid.⁶²⁰

§ 2136. **Compensation of expert witnesses.**

The compensation of experts beyond their fees as witnesses is not necessarily a disbursement and is not taxable as such.⁶²¹

§ 2137. **Fees of referee. .**

The fees of a referee are taxable,⁶²² but expenses of the referee are not allowable in addition to his fees.⁶²³ Such fees are taxable as a disbursement irrespective of their actual payment before taxation, or the solvency or insolvency of the successful party.⁶²⁴ But a party is not entitled to be allowed fees of a referee which he is under no obligation or liability to pay.⁶²⁵ The fees of a referee whose report has been set aside for misconduct cannot be taxed.⁶²⁶

— **Proof of number of days referee acted.** The time “necessarily” spent by the referee must be shown by affidavit before the referee’s fees can be taxed.⁶²⁷ If the time is disputed, it should be shown by the referee’s affidavit thereto.⁶²⁸

⁶¹⁹ *Wheeler v. Ruckman*, 28 Super. Ct. (5 Rob.) 702.

⁶²⁰ *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 74 Hun, 539, 26 N. Y. Supp. 829.

⁶²¹ *Mark v. Buffalo*, 87 N. Y. 184, 13 Wkly. Dig. 415. See, also, *Randall v. Morning Journal Ass’n*, 22 Misc. 715, 49 N. Y. Supp. 1064; *Matter of Grade Crossing Com’rs of Buffalo*, 19 Misc. 230, 77 State Rep. 1073, 43 N. Y. Supp. 1073. Fees of experts held taxable in proceedings for investigation of fiscal affairs of municipality. *Matter of Town of Hempstead*, 36 App. Div. 321, 338, 55 N. Y. Supp. 345.

⁶²² Amount of fees, see post § 2193.

⁶²³ *Brown v. Sears*, 23 Misc. 559, 52 N. Y. Supp. 792.

⁶²⁴ *Clegg v. Aikens*, 17 Abb. N. C. 88.

⁶²⁵ *Wood v. Kroll*, 43 Hun, 328.

⁶²⁶ *Meyer v. Bernheimer*, 5 Month. Law Bul. 46.

⁶²⁷ *Watson v. Gardiner*, 50 N. Y. 671; *Brown v. Windmuller*, 36 Super. Ct. (4 J. & S.) 75.

§ 2138. Fees of commissioner.

The prevailing party is entitled to include his disbursements for fees of a commissioner by whom testimony was taken under a commission.⁶²⁹ This applies to the expenses of a referee appointed under section 873 of the Code to take the deposition of a party in connection with a physical examination before trial.⁶³⁰ The commissioner's fees must be shown to have been necessary,⁶³¹ and hence should not be allowed where the party himself was the only person examined under the commission,⁶³² except where such examination was a matter of absolute necessity and not merely to suit the party's convenience.⁶³³

§ 2139. Jury fees.

Jury fees paid to a jury should be allowed as a disbursement though the jury disagree.⁶³⁴

§ 2140. Stenographer's fees.

There is no express provision in the Code authorizing the taxing of stenographer's fees as a disbursement except in so far as the general clause allowing "such other reasonable and necessary expenses, as are taxable according to the course and practice of the court, or by express provision of law" so permits. There are cases holding that under no circumstances can such fees be included as a disbursement,⁶³⁵ but the later

⁶²⁸ *Shultz v. Whitney*, 9 Abb. Pr. 71, 17 How. Pr. 471.

⁶²⁹ *Dunham v. Sherman*, 11 Abb. Pr. 152, 19 How. Pr. 572; *Simpson v. Rowan*, 13 Civ. Proc. R. (Browne) 206. Necessary expenses in executing a commission in a foreign state are allowable. *Finch v. Calvert*, 13 How. Pr. 13.

⁶³⁰ *Reichel v. New York Cent. & H. R. R. Co.*, 18 Civ. Proc. R. (Browne) 256, 29 State Rep. 841, 9 N. Y. Supp. 415.

⁶³¹ *Burns v. Delaware, L. & W. R. Co.*, 135 N. Y. 268, 272.

⁶³² *Delcomyn v. Chamberlain*, 39 Super. Ct. (7 J. & S.) 359.

⁶³³ *Pyne v. National S. S. Co.*, 44 State Rep. 791, 18 N. Y. Supp. 166.

⁶³⁴ *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28.

⁶³⁵ *Provost v. Farrell*, 13 Hun. 303; *Shaver v. Eldred*, 86 Hun. 51, 33 N. Y. Supp. 158; *Pfaudler Barm Extracting Bunting Apparatus Co. v.*

eases hold that the expense of a copy of the stenographer's minutes, necessarily procured to enable a party to prepare a case or case and exceptions,⁶³⁶ or to enable a party to propose amendments to his opponent's case,⁶³⁷ is taxable as a disbursement; and the later cases also hold that the expense of procuring the stenographer's minutes of a trial for use on a subsequent trial may properly be taxed as a disbursement,⁶³⁸ though the contrary is held in the second department.⁶³⁹ There is no authority, however, for taxing stenographer's fees for a copy of the minutes obtained for the purpose of making a motion for a new trial "in a county court."⁶⁴⁰ However, the cost of minutes obtained for use during the trial cannot be taxed though subsequently used to make a case or propose amendments thereto; thus where, on a reference, both parties used copies of the stenographer's minutes during the reference, and both parties paid half the expense, the mere fact that the minutes were also used to aid in proposing amendments to the case on appeal does not entitle the successful party to tax the remaining half as disbursements.⁶⁴¹ A late case holds that a

Sargent, 43 Hun, 154. In the absence of a stipulation stenographer's fees cannot be taxed as costs in proceedings to investigate fiscal affairs of municipality. *Matter of Town of Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345.

⁶³⁶ *Cutter v. Morris*, 41 Hun, 575; *Varnum v. Wheeler*, 9 Civ. Proc. R. (Browne) 421.

⁶³⁷ Copy is "necessary" only where use of appellant's copy cannot be obtained by the respondent. *Park v. New York Cent. & H. R. R. Co.*, 57 App. Div. 569, 68 N. Y. Supp. 460, 1145; *Ridabock v. Metropolitan El. R. Co.*, 8 App. Div. 309, 40 N. Y. Supp. 938; *Sebley v. Nichols*, 32 How. Pr. 182.

⁶³⁸ *Zelmanovitz v. Manhattan R. Co.*, 24 Civ. Proc. R. (Scott) 402, 67 State Rep. 405, 33 N. Y. Supp. 583; *Flood v. Moore*, 2 Abb. N. C. 91; *Kummer v. Christopher & Tenth St. R. Co.*, 12 Misc. 387, 33 N. Y. Supp. 581. Contra, *Hamilton v. Butler*, 19 Abb. Pr. 446; *Spring v. Day*, 44 How. Pr. 390.

⁶³⁹ *Hudson v. Erie R. Co.*, 57 App. Div. 98, 68 N. Y. Supp. 28, and cases cited; *Herrmann v. Herrmann*, 88 App. Div. 76, 84 N. Y. Supp. 736.

⁶⁴⁰ *Whitney v. Roe*, 75 Hun, 508, 27 N. Y. Supp. 511.

⁶⁴¹ *Gallagher v. Baird*, 60 App. Div. 29, 69 N. Y. Supp. 676.

party cannot be allowed his expenses incurred in obtaining a transcript of the stenographer's minutes, for the use of the court,⁶⁴² but it would seem that where this expense is one which the justice may direct to be borne in equal proportions by each of the parties to the action, it should be taxable as a disbursement.⁶⁴³

In the absence of a stipulation to that effect, stenographer's fees on a reference cannot be taxed as a disbursement.⁶⁴⁴ And this rule applies so that where the parties employ a stenographer to take the minutes, and agree that each party shall pay one-half the fee, the successful party cannot tax as a disbursement the amount paid by him.⁶⁴⁵ Even in case of a stipulation, a stenographer is entitled to no fees for mere attendance on days of adjournment.⁶⁴⁶

§ 2141. Surveyor's fees.

A party cannot tax as a disbursement, in an action for lands, fees paid a surveyor for surveys, made in order that he might know his rights and be prepared to protect them. It is only when the survey is a part of the proceedings in the action, e. g., in the case of partition or admeasurement of dower, that such fees are taxable.⁶⁴⁷

⁶⁴² *Cohen v. Weill*, 33 Misc. 764, 67 N. Y. Supp. 917.

⁶⁴³ See Code Civ. Proc. § 251.

⁶⁴⁴ *Newhall v. Appleton*, 4 Month. Law Bul. 5; *Byrne v. Groot*, 5 Month. Law Bul. 56; *Nugent v. Keenan*, 53 Super. Ct. (21 J. & S.) 530; *Seasongood v. New York El. R. Co.*, 46 State Rep. 832, 22 Civ. Proc. R. (Browne) 100, 18 N. Y. Supp. 775.

⁶⁴⁵ *Nugent v. Keenan*, 53 Super. Ct. (21 J. & S.) 530; *Colton v. Simmons*, 14 Hun, 75. Where such stipulation also provides that each party shall pay one-half the fees of a stenographer to be employed on the new reference, and that the successful party may tax the sum so paid as a disbursement in the case, and plaintiff fails to recover against one of the defendants, though successful as to the others, the successful defendant is entitled to tax the sum actually paid by it for stenographer's fees, but cannot tax the referee's fees, since they are properly taxed in the plaintiff's bill against the other defendants. *Clegg v. Aikens*, 17 Abb. N. C. 88.

⁶⁴⁶ *Blanck v. Spies*, 31 Misc. 19, 62 N. Y. Supp. 1039.

⁶⁴⁷ *Haynes v. Mosher*, 15 How. Pr. 316; followed in *Rothery v. New York Rubber Co.*, 24 Hun, 172.

§ 2142. Sheriff's fees.

The legal fees of a sheriff may be charged as disbursements.⁶⁴⁸

§ 2143. Fees for publication.

The legal fees for publication may be taxed as disbursements where publication is directed pursuant to law.⁶⁴⁹ This is in addition to the ten dollars allowed for procuring an order directing the service of the summons by publication, or personally without the state.

§ 2144. Documentary evidence.

The legal fees paid for a certified copy of a deposition, or other paper, recorded or filed in any public office, where necessarily used or obtained for use on the trial, are taxable as disbursements.⁶⁵⁰ This Code provision seems to overrule a prior decision that the expense of certifying a foreign document could not be taxed.⁶⁵¹ There must, however, be an affidavit that the copies were actually and necessarily used or obtained for use on the trial.⁶⁵² Where several actions are tried together, the expense of certain documents used in all the cases cannot be taxed as a disbursement in each case.⁶⁵³

Amounts paid for maps, surveys, etc., though used as evidence, are not taxable as a disbursement,⁶⁵⁴ nor are sums paid

⁶⁴⁸ Case v. Price, 17 How. Pr. 348, 351.

⁶⁴⁹ Code Civ. Proc. § 3256. See Chevers v. Damon, 37 State Rep. 904, 13 N. Y. Supp. 452.

⁶⁵⁰ Code Civ. Proc. § 3256; Jackson v. Root, 18 Johns. 336. A charge for an exemplified copy of bankrupt proceedings is allowable, it having been necessary in order to set out the proceedings in pleading a discharge. Niles v. Griswold, 3 How. Pr. 23. Fee for secretary of state's certificate and for certified copies of depositions taken to perpetuate testimony, allowed. Jackson v. Mather, 2 Cow. 584.

⁶⁵¹ Hanel v. Baare, 22 Super. Ct. (9 Bosw.) 682.

⁶⁵² Code Civ. Proc. § 3267; Adams v. Ward, 60 How. Pr. 288.

⁶⁵³ Jermain v. Lake Shore & M. S. R. Co., 31 Hun, 558, 562.

⁶⁵⁴ Sinne v. City of New York, 8 Civ. Proc. R. (Browne) 252, note; Rothery v. New York Rubber Co., 90 N. Y. 30; Varnum v. Wheeler, 9 Civ. Proc. R. (Browne) 421.

for plans and measurements used in preparing a case for trial.⁶⁵⁵ The expense of a certified copy of the order of reference, procured to show the referee his authority to act, has, however, been allowed,⁶⁵⁶ as has the necessary expenses of lithographing summons and complaint for use as evidence on the trial and the expense of necessary telegrams.⁶⁵⁷

—**Searches.** Searches affecting property situate in any county, in which the office of county clerk or register is a salaried one, when made and certified to by title insurance, abstract, or searching companies, organized and doing business under the laws of this state, may be used in all actions or special proceedings in which official searches may be used, in place of and with the same legal effect as such official searches, and the expenses of searches so made by said companies shall be taxable at rates not exceeding the cost of similar official searches.⁶⁵⁸ Prior to 1895 sums paid for an unofficial search were not taxable.

§ 2145. Printing expenses.

The reasonable expense of printing the papers for a hearing may be taxed as a disbursement, when required by a rule of court.⁶⁵⁹ Except where regulated by special rule, it is proper to tax printing disbursements at the amount paid, in the absence of proof that the sum charged was fraudulently or collusively exaggerated, or more than the usual trade price for such services at the place of the party's residence.⁶⁶⁰ It has been held that the usual price for printing cases may be allowed, although procured for much less,⁶⁶¹ but a later case holds the contrary.^{661a}

⁶⁵⁵ *Mark v. Buffalo*, 87 N. Y. 184.

⁶⁵⁶ *Toll v. Thomas*, 15 How. Pr. 315, 318.

⁶⁵⁷ *Douglass v. Atwell*, 3 Civ. Proc. R. (Browne) 80.

⁶⁵⁸ Code Civ. Proc. § 3256.

⁶⁵⁹ Code Civ. Proc. § 3256. Only when required by rule of court. *Veeder v. Judson*, 91 N. Y. 374.

⁶⁶⁰ *Salter v. Utica & B. R. R. Co.*, 86 N. Y. 401.

⁶⁶¹ *Consalus v. Brotherson*, 54 How. Pr. 62.

^{661a} *Potter & Markham v. Carpenter & Co.*, 56 How. Pr. 89.

§ 2146. Expenses relating to judgment and execution.

A party, to whom costs are awarded in an action, is entitled to include in his bill of costs prospective charges for the expenses of entering and docketing the judgment, and the sheriff's fees for receiving and returning one execution thereon, including the search for property.⁶⁶²

§ 2147. Service of papers.

The expenses of serving subpoenas cannot be allowed as disbursements.⁶⁶³ The sheriff's fee for serving a summons is taxable as a disbursement,⁶⁶⁴ as is compensation for the service of a summons by one other than an officer,⁶⁶⁵ but where service is by a person other than the officer, the rate therefor must not exceed the limit of the sheriff's fee for similar services.⁶⁶⁶ Only one travel fee can be charged on making any one service.⁶⁶⁷

(C) INCREASED COSTS.**§ 2148. When defendant entitled to.**

"In either of the following cases, a defendant in whose favor a final judgment⁶⁶⁸ is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a state writ, is entitled to recover the

⁶⁶² Code Civ. Proc. § 3256. Where there are several defendants, fee for docketing judgment in the county where each one resides may be allowed. *Toll v. Thomas*, 15 How. Pr. 315.

⁶⁶³ *Burnett v. Westfall*, 15 How. Pr. 430; *Town of Pierrepont v. Lovell*, 4 Hun, 681.

⁶⁶⁴ Code Civ. Proc. § 3307.

⁶⁶⁵ *Equitable Life Assur. Soc. v. Hughes*, 125 N. Y. 106, 112.

⁶⁶⁶ *Case v. Price*, 17 How. Pr. 348, 9 Abb. Pr. 111.

⁶⁶⁷ *Benedict v. Warriner*, 14 How. Pr. 568.

⁶⁶⁸ It seems that it is immaterial whether the judgment is founded on a verdict, a decision, or a referee's report. *Tilliou v. Sparks*, 9 How. Pr. 465. It applies where plaintiff is nonsuited. *Platt v. Sherry*, 7 Wend. 236.

Art. V. Amount.—C. Increased Costs.—When Defendant Entitled To.

costs, prescribed in section 3251 of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the state, or a person specially appointed, according to law, to perform the duties of such an officer, and the action or special proceeding was brought by reason of an act done by him by virtue of his office, or an alleged omission by him to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or person, or in his aid or assistance, touching the duties of the office or appointment.⁶⁶⁹

3. Where the action was brought against the defendant for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the state.”

These costs are generally called double costs. They are demandable, in a proper case, as a matter of right.⁶⁷⁰

This Code section does not apply where plaintiff recovers though the amount of the recovery is so small that defendant is entitled to costs.⁶⁷¹ Nor does it apply to an action by a sheriff upon the bond of indemnity given by his deputy,⁶⁷² but it does apply to an action by an execution debtor against a sheriff to recover moneys collected by the defendant in excess of what was necessary to satisfy the execution.⁶⁷³

⁶⁶⁹ This subdivision applies only to third persons who are strangers to the process, and called on by the officer to assist him, but does not apply to a party to such action, who aided the officer solely in his own behalf. *Bradley v. Fay*, 18 How. Pr. 481. Persons working out their highway tax under the direction of a highway officer duly authorized are deemed acting in his aid, touching the duties of his office, within this subdivision. *Van Bergen v. Ackles*, 21 How. Pr. 314. A co-defendant of the officer, who is merely charged with maliciously prosecuting the warrant issued by the officer, is not entitled to double costs. *Row v. Sherwood*, 6 Johns. 109.

⁶⁷⁰ *Smith v. Cooper*, 30 Hun, 395.

⁶⁷¹ *Nichols v. Ketcham*, 19 Johns. 167.

⁶⁷² *Conner v. Keese*, 38 Hun, 124.

⁶⁷³ *Van Gelder v. Hallenbeck*, 15 Civ. Proc. R. (Browne) 333, 18 State Rep. 19, 2 N. Y. Supp. 252.

Art. V. Amount.—C. Increased Costs.—When Defendant Entitled To.

This section applies to mandamus proceedings against a public official where there is an alternative writ,⁶⁷⁴ but not to certiorari proceedings,⁶⁷⁵ nor to suits in equity.⁶⁷⁶ An information in the nature of quo warranto against an officer to try his title to the office is not a proceeding for an act done by virtue of his office, within the provision.⁶⁷⁷

It has been held that actions commenced in justice's court and brought into the county court, and thence into the supreme court on appeal, where final judgment is rendered for the defendant, are within the provision,⁶⁷⁸ but a late decision seems to hold the contrary.⁶⁷⁹

— **Who are officers.** The collector of a school district is, within this Code provision, an officer,⁶⁸⁰ as is a surrogate,⁶⁸¹ or an overseer of the poor,⁶⁸² or inspectors of election,⁶⁸³ or a constable,⁶⁸⁴ or a policeman.⁶⁸⁵ But the board of supervisors of a county is not a "public officer."⁶⁸⁶ Indemnitors substituted as defendants in place of a sheriff are not entitled to double costs.⁶⁸⁷

— **Nonfeasance and misfeasance.** Under the Revised Statutes it was held that increased costs were proper only where the officer was charged with misfeasance as distinguished from nonfeasance,⁶⁸⁸ but the Code provision now includes an action based on "an alleged omission" to do an act.⁶⁸⁹

⁶⁷⁴ *People v. Speed*, 73 Hun, 302, 26 N. Y. Supp. 254.

⁶⁷⁵ *People v. Town Auditors*, 42 App. Div. 250, 59 N. Y. Supp. 10; *Clute v. Van Slyck*, 3 Cow. 17.

⁶⁷⁶ *Taaks v. Schmidt*, 25 How. Pr. 340; *Stewart v. Schultz*, 50 Barb 192.

⁶⁷⁷ *People v. Adams*, 9 Wend. 464.

⁶⁷⁸ *Porter v. Cobb*, 25 Hun, 184.

⁶⁷⁹ *Levene v. Hahner*, 62 App. Div. 195, 70 N. Y. Supp. 913.

⁶⁸⁰ *Reynolds v. Moore*, 9 Wend. 35.

⁶⁸¹ *Burhans v. Blanchard*, 1 Denio, 626.

⁶⁸² *Gallup v. Bell*, 20 Hun, 172.

⁶⁸³ *People v. Speed*, 73 Hun, 302, 26 N. Y. Supp. 254.

⁶⁸⁴ *Jones v. Gray*, 13 Wend. 280.

⁶⁸⁵ *Enright v. Shalvey*, 1 City Ct. R. 58.

⁶⁸⁶ *People v. Supervisors of Niagara*, 50 How. Pr. 353.

⁶⁸⁷ *Isaacs v. Cohen*, 86 Hun, 119, 33 N. Y. Supp. 188.

⁶⁸⁸ *Platt v. Osborn*, 2 Cow. 527.

Art. V. Amount.—C. Increased Costs.—When Defendant Entitled To.

— **Allowance in interlocutory proceedings.** This Code provision as to increased costs does not extend to costs on special motions in the progress of the cause⁶⁹⁰ nor to costs on demurrer.⁶⁹¹ The officer cannot have double costs until the recovery of final judgment.⁶⁹² If a favor is granted to plaintiff "on payment of costs," single costs are intended.⁶⁹³

— **Waiver of right.** Where an officer or other person, specified herein, unites in his answer with a person not entitled to such additional costs, the right thereto is waived.⁶⁹⁴

— **Proceedings to obtain.** Though there are cases holding that the increased costs may be taxed by the clerk without application to the court,⁶⁹⁵ yet the safer practice is that fixed by the earlier cases which hold that an application to the court is necessary.⁶⁹⁶ Only single costs of the motion will be allowed.⁶⁹⁷ The motion papers should be accompanied by a certificate of the judge who presided at the trial, stating the facts showing the right to increased costs.⁶⁹⁸

§ 2149. Double damages as carrying double costs.

A plaintiff, who recovers double or other increased damages, does not thereby become entitled to more than single costs, except where it is otherwise specially prescribed by law.⁶⁹⁹

⁶⁹⁰ See *People v. Colborne*, 20 How. Pr. 378.

⁶⁹¹ *Rider v. Hubbell*, 4 Wend. 201; *Waring v. Acker*, 1 Hill, 673.

⁶⁹² *Stone v. Woods*, 5 Johns. 182. Where the officer has judgment, both on an issue of fact and an issue of law, he is entitled to single costs on the former, and double costs on the latter. *Gibbs v. Bull*, 20 Johns. 212.

⁶⁹³ *Seymour v. Billings*, 12 Wend. 285.

⁶⁹⁴ *Saratoga & W. R. Co. v. McCoy*, 7 How. Pr. 190.

⁶⁹⁵ Code Civ. Proc. § 3258; *Wales v. Hart*, 2 Cow. 426; *Merrill v. Near*, 5 Wend. 237; *Bradley v. Fay*, 18 How. Pr. 481; *Lawrence v. Titus*, 1 Super. Ct. (1 Hall) 421.

⁶⁹⁶ *Wheelock v. Hotchkiss*, 18 How. Pr. 468; *Wood v. Commissioners of Excise of Randolph*, 9 Misc. 507, 30 N. Y. Supp. 344.

⁶⁹⁷ *Mack v. McCullock*, 2 How. Pr. 127; *Stewart v. Schultz*, 33 How. Pr. 3.

⁶⁹⁸ *Mack v. McCullock*, 2 How. Pr. 127.

⁶⁹⁹ Code Civ. Proc. § 3248.

⁷⁰⁰ Code Civ. Proc. § 3257.

§ 2150. Increased disbursements.

The increase in costs does not extend to the disbursements; and an officer, witness, or juror, is not entitled to any other fee in the action, except the single fee allowed by law for his services.⁷⁰⁰

§ 2151. Treble costs.

Section 14 of chapter 16 of the General Laws provides for treble costs in actions against an officer of the militia or a person acting under his authority where plaintiff is nonsuited or has a verdict or judgment rendered against him. And it has been held that a constable, in executing a military warrant issued by the colonel of the regiment, is to be deemed a person acting under the authority of a militia officer, and if prosecuted therefor is entitled to treble costs.⁷⁰¹

(D) ADDITIONAL ALLOWANCES.**(1) AS A MATTER OF RIGHT.****§ 2152. Code provision.**

The question of allowances as a matter of right is regulated by section 3252 of the Code. Except on settlement of the action, this allowance cannot be granted until the entry of final judgment in the action and then only where plaintiff is entitled to costs.⁷⁰²

§ 2153. Persons entitled.

The allowance can be granted only to plaintiff.⁷⁰³

§ 2154. Actions in which demandable.

An allowance must be awarded, as a matter of right, to plaintiff, where a final judgment is rendered in his favor and he recovers costs, in the following actions, viz.:

⁷⁰⁰ Code Civ. Proc. § 3259.

⁷⁰¹ Walker v. Burnham, 7 How. Pr. 55.

^{702, 703} Code Civ. Proc. § 3252.

Art. V. Amount.—D. Additional Allowances.—1. As of Right.

1. Action to foreclose a mortgage on real property.
2. Action for partition of real property.
3. Action to procure an adjudication on a will or other instrument in writing.⁷⁰⁴
4. Action to compel the determination of a claim to real property.
5. Action where a warrant of attachment against property has been issued.⁷⁰⁵

Proceedings to foreclose a mechanic's lien do not constitute an action "for the foreclosure of a mortgage," or "proceedings to compel the determination of claim to real property."⁷⁰⁶

§ 2155. Basis of computation.

The percentages are to be estimated upon the amount found to be due upon the mortgage; or the value of the property partitioned, affected by the adjudication upon the will or other instrument, or the claim to which is determined; or the value of the property attached, not exceeding the sum recovered, or claimed, as the case may be.

In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, the percentages must be computed upon the whole sum unpaid upon the mortgage. But if it directs the sale of a part only, they must be computed upon the sum actually due; and if the court thereafter grants an order, directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due; but the aggregate of the percentages shall not exceed the sum, which would have been allowed, if the

⁷⁰⁴ Meaning of term "adjudication on a will," etc., see *Gray v. Robjohn*, 14 Super. Ct. (1 Bosw.) 618.

⁷⁰⁵ Code Civ. Proc. § 3252. The property must have been actually attached (*Fisher v. English*, 4 Month. Law Bul. 37) and the warrant of attachment not vacated. *Iselin v. Graydon*, 26 How. Pr. 95; *Parsons v. Sprague*, 19 Wkly. Dig. 467.

⁷⁰⁶ *Randolph v. Foster*, 3 E. D. Smith, 648, 4 Abb. Pr. 262; *Wright v. Reusens*, 39 State Rep. 802, 15 N. Y. Supp. 504; *Carney v. Reilly*, 18 Misc. 11, 40 N. Y. Supp. 1123.

Art. V. Amount.—D. Additional Allowances.—1. As of Right.

entire sum secured by the mortgage had been due, when final judgment was rendered.⁷⁰⁷

The allowance, when an attachment has been issued, and vacated on the giving of a bond, is computed on the amount of the bond.⁷⁰⁸

§ 2156. Amount.

The amount is fixed by section 3252 of the Code as follows:

Upon a sum, not exceeding \$200, ten per cent.

Upon an additional sum, not exceeding \$400, five per cent.

Upon an additional sum, not exceeding \$1,000, two per cent.

Where the action is settled before judgment, the plaintiff is entitled to a percentage on the amount paid or secured on the settlement, at one-half of the above rates. Figuring up this percentage it will be found that sixty dollars is the maximum where the case is not settled and thirty dollars where the case is settled.⁷⁰⁹

§ 2157. Procedure to obtain.

The allowance must be computed by the clerk on the taxation; but the value of property, required to be ascertained for that purpose, must be ascertained by the court unless it has been fixed by the decision or report or verdict on which the final judgment is entered; except that, in case of actual partition, it must be determined by the commissioners.⁷¹⁰ It is not necessary to move the court in order to obtain the allowance provided by this section. The extra percentage attaches as a fixed right to plaintiff, on recovery of judgment. It is, therefore, the clerk's duty, in adjusting costs in such cases, to insert in the entry of the judgment such percentage, as a part of the sum of costs allowed by the Code.⁷¹¹

⁷⁰⁷ Code Civ. Proc. § 3252.

⁷⁰⁸ Hanover Nat. Bank v. Linneworth, 7 Hun, 234.

⁷⁰⁹ Bryon v. Durrie, 6 Abb. N. C. 135.

⁷¹⁰ Code Civ. Proc. § 3262; Newton v. Reid, 24 Wkly. Dig. 472.

⁷¹¹ So held under old Code. Hunt v. Middlebrook, 14 How. Pr. 300.

(2) AS A MATTER OF DISCRETION.

§ 2158. General considerations.

For the trouble and expense in preparing for trial and also in conducting the trial, in excess of the amount awarded as ordinary costs, section 3253 of the Code provides for a discretionary additional allowance. Section 3252 of the Code, already considered, provides for allowances as a matter of right while the following section, now to be considered, enumerates the actions in which the court has discretion. In the one case, the court has nothing to do with the granting or the amount of the allowance; in the other, the court has discretion both as to granting and also as to the amount of the allowance.⁷¹² Furthermore, in one and the same action, an allowance of right may be taxed and also an allowance awarded by the court in the exercise of its discretion. The additional allowance is made by way of indemnity to the party succeeding.⁷¹³

The power to grant the successful party an extra allowance is not affected by the death of the opposite party pending decision of a motion for an extra allowance.⁷¹⁴

§ 2159. Right to costs as condition precedent.

Only a party entitled to costs can be awarded an allowance.⁷¹⁵ For instance, an additional allowance will not be awarded to plaintiff succeeding in an action against a city, where the claim was not presented to the chief fiscal officer of the city.⁷¹⁶ An additional allowance should not be made to

⁷¹² *Morss v. Hasbrouck*, 13 Wkly. Dig. 393; *Hurd v. Farmers' Loan & Trust Co.*, 16 Wkly. Dig. 480.

⁷¹³ *Meyer Rubber Co. v. Lester Shoe Co.*, 86 Hun, 473, 33 N. Y. Supp. 888.

⁷¹⁴ *Arthur v. Schriever*, 60 Super. Ct. (28 J. & S.) 59, 16 N. Y. Supp. 610. The same rule applies where the attorney for the opposing party dies. *Id.*

⁷¹⁵ *Couch v. Millard*, 41 Hun, 212, 4 State Rep. 167; *Kahn v. Schmidt*, 83 Hun, 541, 65 State Rep. 190, 32 N. Y. Supp. 33; *Frost v. Reinach*, 40 Misc. 412, 81 N. Y. Supp. 246.

⁷¹⁶ *Brewster v. City of Hornellsville*, 35 App. Div. 626, 54 N. Y. Supp. 915.

the plaintiff where the controversy has been whether his recovery should be reduced by the amount of a counterclaim, and such counterclaim has been established by the defendant,⁷¹⁷ but has been allowed where equitable defenses have been sustained in part.⁷¹⁸ Neither party will be awarded an allowance where plaintiff fails in his action and defendant in his counterclaim.⁷¹⁹ But a defendant who becomes entitled to costs by reason of the plaintiff's recovering less than fifty dollars may be awarded an allowance.⁷²⁰

§ 2160. Matters considered in exercising discretion.

In determining whether to award an allowance, in a proper case, the important question is whether such an award will be equitable.⁷²¹ No allowance will be awarded where the case is one of great hardship,⁷²² nor where the defeated party who has acted in good faith is poor.⁷²³ So plaintiff will not be granted an extra allowance where his conduct misled defendant into interposing a defense.⁷²⁴ And an allowance may be refused the defendant where his conduct invited the action.⁷²⁵ So an extra allowance will not be granted against a savings bank where its assets are not sufficient to pay all its depositors.⁷²⁶ The motion will also be denied where two causes involving the same questions are tried together and plaintiff has

⁷¹⁷ *New York, L. E. & W. R. Co. v. Carhart*, 39 Hun, 363; *Commercial Nat. Bank v. Hand*, 27 App. Div. 145, 50 N. Y. Supp. 515.

⁷¹⁸ *State Bank of Lock Haven v. Smith*, 85 Hun, 200, 66 State Rep. 483, 32 N. Y. Supp. 999.

⁷¹⁹ *Hall v. United States Reflector Co.*, 5 Month. Law Bul. 1.

⁷²⁰ *United Press v. New York Press Co.*, 164 N. Y. 406, 414; *Commissioners of Pilots v. Spofford*, 3 Hun, 57.

⁷²¹ *Mitchell v. Lane*, 62 Hun. 253, 16 N. Y. Supp. 707.

⁷²² *Losee v. Bullard*, 54 How. Pr. 319; *Maher v. Garry*, 3 App. Div. 480, 499, 38 N. Y. Supp. 436, 448. *Contra*, *Lane v. Van Orden*, 63 How. Pr. 237.

⁷²³ *Van Brunt v. Van Brunt*, 14 State Rep. 887.

⁷²⁴ *Kelly v. Chenango Valley Sav. Bank*, 79 State Rep. 658, 45 N. Y. Supp. 658.

⁷²⁵ *Baldwin v. Reardon*, 48 Super. Ct. (16 J. & S.) 166.

⁷²⁶ *Hurd v. Farmers' Loan & Trust Co.*, 16 Wkly. Dig. 480; *Kelly v. Chenango Valley Sav. Bank*, 79 State Rep. 658, 45 N. Y. Supp. 658.

recovered two bills of costs,⁷²⁷ or where defendants unnecessarily sever in their defense and thereby become entitled to two bills of costs.⁷²⁸ The fact that plaintiff, on obtaining an injunction, gave an undertaking for damages sustained by the party enjoined if the injunction should not be sustained, does not deprive defendant of the right to an extra allowance, though such allowance may be considered by the court on assessment of damages upon the undertaking.⁷²⁹

§ 2161. Stipulation as affecting.

An extra allowance should not be granted on a stipulation that it would be waived if no appeal was taken from the judgment.⁷³⁰

§ 2162. Ownership of allowance.

An extra allowance belongs to the client, in the absence of any stipulation.⁷³¹ But the attorney's lien attaches thereto when included in the judgment.⁷³²

§ 2163. Effect, on allowance, of setting aside of verdict or judgment.

The allowance falls where the verdict on which it is based is set aside.⁷³³ Thus where there has been an extra allowance awarded but the judgment has been subsequently reversed, an extra allowance may be granted on the second trial but the

⁷²⁷ *Sackett v. Ball*, 4 How. Pr. 71.

⁷²⁸ *Matthewson v. Thompson*, 9 How. Pr. 231; *Tillman v. Powell*, 13 How. Pr. 117.

⁷²⁹ *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305. See, also, *Peet v. Kimball*, 102 State Rep. 1010, 68 N. Y. Supp. 1010.

⁷³⁰ *Thames Loan & Trust Co. v. Hagemeyer*, 38 App. Div. 449, 56 N. Y. Supp. 689.

⁷³¹ *Mellvaine v. Steinson*, 90 App. Div. 77, 82, 85 N. Y. Supp. 889.

⁷³² *Barry v. Third Ave. R. Co.*, 87 App. Div. 543, 84 N. Y. Supp. 830. Title to costs in general, see vol. 1, p. 259.

⁷³³ *Meeker v. Remington & Son Co.*, 62 App. Div. 476, 70 N. Y. Supp. 1072; *Hicks v. Waltermire*, 7 How. Pr. 370; *McQuade v. New York & E. R. Co.*, 11 How. Pr. 434, 12 Super. Ct. (5 Duer) 613.

allowance awarded on the first trial cannot be taxed.⁷³⁴ Restitution may be compelled of an attorney where there is a reversal especially if the allowance has not been turned over to the clients.⁷³⁵

§ 2164. Persons entitled and persons liable.

The additional allowance may be awarded "to any party," i. e., any successful party.⁷³⁶ An allowance may be made, in a proper case, both to plaintiffs and to defendants.⁷³⁷ Where two defendants appear by the same attorney, but one allowance will be granted.⁷³⁸ Where the issue is solely between defendants, plaintiff will not be awarded an allowance.⁷³⁹ Where plaintiff sues as a poor person, he is not entitled to an extra allowance nor can one be awarded against him.⁷⁴⁰ In an action for an injunction and damages to property held in trust and abutting on an elevated railroad, where the beneficiaries, refusing to join in the action, have been made parties defendant, the court may grant them an extra allowance as against the railroad company.⁷⁴¹ Where an additional allowance is made to several defendants and the judgment is reversed only as to a part of the defendants, the court can order that the successful defendants tax their proportional share of the entire allowance.⁷⁴²

The payment of an allowance out of a fund, the power to order which is inherent in a court of equity and not governed

⁷³⁴ *Bank of Mobile v. Phoenix Ins. Co.*, 8 Civ. Proc. R. (Browne) 212.

⁷³⁵ *Shotwell v. Dixon*, 66 App. Div. 123, 72 N. Y. Supp. 668.

⁷³⁶ *Noyes v. Children's Aid Soc.*, 3 Abb. N. C. 36, 70 N. Y. 481.

⁷³⁷ *Weed v. Paine*, 13 Abb. N. C. 200, 4 Civ. Proc. R. (Browne) 305, 31 Hun, 10; *Betts v. Betts*, 4 Abb. N. C. 317, 57 How. Pr. 355, note.

⁷³⁸ *New Mfg. Co. v. Galway*, 23 Civ. Proc. R. (Browne) 239, 26 N. Y. Supp. 950.

⁷³⁹ *Poillon v. Cudlipp*, 50 How. Pr. 366.

⁷⁴⁰ *Marx v. Manhattan R. Co.*, 3 N. Y. Supp. 113.

⁷⁴¹ *Roberts v. New York El. R. Co.*, 12 Misc. 345, 67 State Rep. 386, 33 N. Y. Supp. 685.

⁷⁴² *Metropolitan El. R. Co. v. Duggin*, 58 Hun, 156, 33 State Rep. 836, 19 Civ. Proc. R. (Browne) 255, 11 N. Y. Supp. 353.

by Code provisions,⁷⁴³ will not be considered in this connection further than to state that an allowance should not be made to parties in an action for the settlement of accounts, payable out of assets in the hands of a receiver, where there are not enough assets to pay the creditors who have been brought in as parties.⁷⁴⁴

— **Guardian ad litem.** An extra allowance may be awarded a guardian ad litem in an equity case in the exercise of the power inherent in the court. Such an allowance is not governed, or limited, by the Code provision now being considered. Such an allowance out of a fund, in excess of taxable costs, is proper only where the infant has an interest in the subject-matter.⁷⁴⁵ Furthermore, the allowance can only be made out of the shares of the infants.⁷⁴⁶

§ 2165. Number of allowances.

But one allowance can be recovered, although the case may have been tried several times,⁷⁴⁷ except in an ejectment action.⁷⁴⁸ This does not mean, however, that separate allowances cannot be made to different parties in the same action. Where an extra allowance is made in a decree for partition and sale, a further extra allowance cannot be made in the same action, on the making of a decree confirming the sale and directing the distribution of the proceeds.⁷⁴⁹

⁷⁴³ See *Matter of Holden*, 126 N. Y. 589; *Pierson v. Drexel*, 11 Abb. N. C. 150; *Chester v. Jumel*, 24 State Rep. 230, 5 N. Y. Supp. 823.

⁷⁴⁴ *Smith v. Green*, 8 Civ. Proc. R. (Browne) 163. Compare, however, *Durant v. Pierson*, 33 State Rep. 207, 19 Civ. Proc. R. (Browne) 203, 12 N. Y. Supp. 145.

⁷⁴⁵ *Doremus v. Crosby*, 66 Hun, 125, 20 N. Y. Supp. 906, and cases cited.

⁷⁴⁶ *Matter of Holden*, 126 N. Y. 589.

⁷⁴⁷ *Flynn v. Equitable Life Assur. Soc.*, 18 Hun, 212; *Bank of Mobile v. Phoenix Ins. Co.*, N. Y. Daily Reg. Dec. 24, 1883; *Monnett v. Merz*, 30 Abb. N. C. 281, 24 N. Y. Supp. 485.

⁷⁴⁸ Upon the second trial of an ejectment action had under Code Civ. Proc. § 1525, the court may grant an extra allowance, although one was also granted and paid to the same party on the former trial. *Wing v. De La Rionda*, 131 N. Y. 422; *Bolton v. Shriever*, 135 N. Y. 65.

⁷⁴⁹ *Brewer v. Brewer*, 11 Hun, 147.

§ 2166. Actions and proceedings in which allowed.

Additional allowances, in addition to those demandable as a matter of right, may be awarded, in the discretion of the court, to any party, in four classes of proceedings, viz.:

1. Actions to foreclose a mortgage on real property.⁷⁵⁰
2. Actions for the partition of real property.
3. Difficult and extraordinary actions.
4. Special proceeding by certiorari to review an assessment, except in the first and second judicial districts.

In the actions mentioned, however, a defense must have been interposed.

An allowance cannot be awarded in a “difficult and extraordinary” action unless there is some basis on which the percent authorized by statute may be computed.⁷⁵¹

It will be necessary to consider the meaning only of the third class of cases enumerated.

— **“Difficult and extraordinary” cases.** Prior to 1859, an allowance could be granted where the case was difficult “or” extraordinary. Now the case must be difficult “and” extraordinary. Attempts to define the terms “difficult” and “extraordinary”⁷⁵² have been unsatisfactory. An early case decided under the old Code held that the legislature intended to empower the court to award an allowance in all “litigated trials,”⁷⁵³ but such rule was not followed.⁷⁵⁴ The practice of making an allowance in “every” case as a “difficult and extraordinary” case is condemned in a recent decision of the court of appeals⁷⁵⁵ which holds that the words “difficult and

⁷⁵⁰ That action to foreclose need not be “difficult and extraordinary,” see *Lockwood v. Salmon River Paper Co.*, 49 State Rep. 303, 20 N. Y. Supp. 974.

⁷⁵¹ Basis of computation, see post, § 2168.

⁷⁵² The word “difficult” should be applied to questions of law in the action while “extraordinary” may apply to any other feature or circumstance distinguishing the case from ordinary actions. *Fox v. Gould*, 5 How. Pr. 278. See, also, *Fox v. Fox*, 22 How. Pr. 453.

⁷⁵³ *Dyckman v. McDonald*, 5 How. Pr. 121. See, also, *Schwartz v. Poughkeepsie Mut. F. Ins. Co.*, 10 How. Pr. 93.

⁷⁵⁴ *Fox v. Gould*, 5 How. Pr. 278.

⁷⁵⁵ *Standard Trust Co. v. New York Cent. & H. R. R. Co.*, 178 N. Y. 407.

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extraordinary” must be given their usual and accepted meaning, though admitting that no general rule specifying the precise limitation on the power of the courts to grant an allowance can be laid down. In the fourth department, a rigid rather than a liberal construction has been given to the phrase “difficult and extraordinary,”⁷⁵⁶ and an allowance in an action to recover damages for injuries at a railroad crossing has been refused on the ground that while the case may be difficult it is not extraordinary.⁷⁵⁷ Ordinarily negligence cases are neither “difficult” nor “extraordinary.”⁷⁵⁸ As a matter of fact, the courts have paid very little attention to the word “extraordinary,”⁷⁵⁹ unless cases of constant occurrence can be considered extraordinary.⁷⁶⁰ Whether an action is difficult and extraordinary is a matter largely to be determined by the trial court and the discretion exercised will not be disturbed on appeal except in case of clear abuse.⁷⁶¹ Whether a case is difficult is to be determined as of the time when plaintiff obtained an ex parte order of discontinuance and not by the subsequent litigation as to the validity of such order.⁷⁶² It cannot be determined that a case is difficult and extraordinary where judgment is rendered on sustaining a demurrer to the complaint on the ground that the court has no jurisdiction of the cause of action.⁷⁶³

In order to determine whether a case is difficult and extraordinary, it has been held that the engagement of expert

⁷⁵⁶ *Swan v. Stiles*, 94 App. Div. 117, 125, 87 N. Y. Supp. 1089.

⁷⁵⁷ *Smith v. Lehigh Valley R. Co.*, 77 App. Div. 47, 80 N. Y. Supp. 390.

⁷⁵⁸ *Standard Trust Co. v. New York Cent. & H. R. R. Co.*, 178 N. Y. 407. Followed in *Harvey v. Fargo*, 99 App. Div. 599, 91 N. Y. Supp. 84, and *Wright v. Fleischmann*, 99 App. Div. 547, 91 N. Y. Supp. 116.

⁷⁵⁹ Allowance awarded in action for goods sold and delivered. *National Lead Co. v. Dauchy*, 22 Misc. 372, 49 N. Y. Supp. 379.

⁷⁶⁰ That they cannot, see *Duncan v. De Witt*, 7 Hun, 184; *Smith v. Lehigh Valley R. Co.*, 77 App. Div. 47, 80 N. Y. Supp. 390.

⁷⁶¹ *Seagrist v. Sigrist*, 20 App. Div. 326, 46 N. Y. Supp. 949; *Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459, and cases cited.

⁷⁶² *Angier v. Hager*, 51 App. Div. 171, 64 N. Y. Supp. 692.

⁷⁶³ *Genet v. Delaware & H. Canal Co.*, 57 Hun, 174, 10 N. Y. Supp. 467.

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counsel to assist the attorneys of record may be considered,⁷⁶⁴ as may the fact that plaintiff's attorney has a contingent interest in the verdict,⁷⁶⁵ or that the verdict is a very large one and dangerously near being excessive,⁷⁶⁶ or the amount involved,⁷⁶⁷ or the length of time the trial lasted,⁷⁶⁸ or that the preparation for trial was expensive and the trial long and tedious,⁷⁶⁹ or preparation and travel in obtaining a change of place of trial,⁷⁷⁰ or that the recovery was far less than the demand,⁷⁷¹ or that more than one trial has been had,⁷⁷² or that a large number of witnesses, including experts, were examined.⁷⁷³ Where the case was one of fact necessarily within a narrow compass, only five witnesses being sworn at the trial, and the plaintiff, his counsel and all the witnesses, live at the place of trial, the case was not an extraordinary or difficult one.⁷⁷⁴ Where an action, if difficult and extraordinary, is so by reason of the advancement of claims by plaintiff, which are subsequently abandoned, an extra allowance to plaintiff should not be granted.⁷⁷⁵ So where the difficulty or length of the litigation is caused by plaintiff's claiming more than he can recover, he should not have an allowance.⁷⁷⁶

⁷⁶⁴ Kilmer v. Evening Herald Co., 70 App. Div. 291, 75 N. Y. Supp. 243.

⁷⁶⁵, ⁷⁶⁶ Allen v. Albany R. Co., 22 App. Div. 222, 47 N. Y. Supp. 1017.

⁷⁶⁷ Gooding v. Brown, 35 Hun, 153.

⁷⁶⁸ Sackett v. Ball, 4 How. Pr. 71; Howard v. Rome & T. Plank-Road Co., 4 How. Pr. 416; Fort v. Gooding, 9 Barb. 388. An allowance ought not to be granted on a trial of an ordinary case occupying only two or three hours, though the questions were somewhat complicated. Dexter v. Gardner, 1 Code R. (N. S.) 80, 5 How. Pr. 417. Action on short cause calendar is not difficult. Gillespy v. Billbrough, 15 App. Div. 212, 44 N. Y. Supp. 260.

⁷⁶⁹ Seagrist v. Sigrist, 20 App. Div. 336, 46 N. Y. Supp. 949.

⁷⁷⁰ Proctor v. Soulier, 8 App. Div. 69, 40 N. Y. Supp. 459.

⁷⁷¹ Meyer Rubber Co. v. Lester Shoe Co., 92 Hun, 53, 36 N. Y. Supp. 729.

⁷⁷² Comins v. Jefferson Sup'rs, 3 T. & C. 296; Lahey v. Kortright, 58 Super. Ct. (26 J. & S.) 576, 11 N. Y. Supp. 47; Shiels v. Wortmann, 30 State Rep. 173, 8 N. Y. Supp. 799.

⁷⁷³ McCulloch v. Dobson, 39 State Rep. 908, 15 N. Y. Supp. 602.

⁷⁷⁴ Powers v. Wolcott, 12 How. Pr. 565.

⁷⁷⁵ Hinman v. Ryder, 44 Super. Ct. (12 J. & S.) 330.

⁷⁷⁶ Sands v. Sands, 6 How. Pr. 453.

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An extra allowance will be granted to the party successful on a new trial, although not difficult or extraordinary, where, although the same party was successful on the first trial, which was of a difficult and extraordinary nature, the judgment was reversed and a new trial ordered.⁷⁷⁷

— **Special proceedings.** An allowance cannot be awarded in special proceedings,⁷⁷⁸ except in certiorari proceedings to review an assessment,⁷⁷⁹ and, in some cases, in condemnation proceedings.⁷⁸⁰

§ 2167. Allowance where no trial has been had.

It is not necessary that a trial should take place to entitle the prevailing party to an allowance, but it is enough that a defense has been interposed.⁷⁸¹ And a defense need not be interposed to authorize an allowance not in excess of two hundred dollars in an action to foreclose a mortgage. But the order cannot be made when an issue, either of law or fact, remains to be determined as to any of the parties.⁷⁸² An allowance can be granted only on recovery of final judgment.⁷⁸³ An interlocutory judgment providing, *inter alia*, for a reference of the question of damages and that on the confirmation of the report a final judgment should be entered for the damages found and costs, “together with an allowance in addi-

⁷⁷⁷ *Howell v. Van Sicklen*, 70 N. Y. 595.

⁷⁷⁸ *Matter of Brooklyn*, 148 N. Y. 107; *Matter of Holden*, 126 N. Y. 589; *Matter of Grade Crossing Com'rs of Buffalo*, 20 App. Div. 271, 46 N. Y. Supp. 1070; *German Sav. Bank v. Sharer*, 25 Hun, 409. Allowance in mandamus proceedings. *People v. Hertle*, 46 App. Div. 505, 60 N. Y. Supp. 23, 61 N. Y. Supp. 965; *People v. Coler*, 58 App. Div. 347, 68 N. Y. Supp. 1101.

⁷⁷⁹ Code Civ. Proc. § 3253. Allowance cannot be awarded in first or second judicial district. *Id.*

⁷⁸⁰ Code Civ. Proc. § 3372.

⁷⁸¹ *Carter v. Clark*, 32 Super. Ct. (2 Sweeny) 189; *Lockwood v. Salmon River Paper Co.*, 49 State Rep. 303, 20 N. Y. Supp. 974.

⁷⁸² *Bush v. O'Brien*, 52 App. Div. 452, 65 N. Y. Supp. 131.

⁷⁸³ *Bostwick v. Tioga R. Co.*, 17 How. Pr. 456; *Rudd v. Robinson*, 54 Hun, 339, 7 N. Y. Supp. 535; *De Stuckle v. Tehuantepec R. Co.*, 3 Civ. Proc. R. (Browne) 410.

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tion to costs, the amount thereof to be fixed by the court on the entry of final judgment," does not require the court to grant an extra allowance where the reference was abandoned.⁷⁸⁴

— **When defense is interposed.** The Code provides that a defense must be interposed to entitle a party to an additional allowance except in partition actions,⁷⁸⁵ and in foreclosure suits where not more than two hundred dollars is sought as an allowance.⁷⁸⁶ Pursuant to this provision an allowance is refused where a controversy is submitted on an agreed statement of facts.⁷⁸⁷ A defense is interposed where there is an answer merely setting up denials,⁷⁸⁸ or where a demurrer is interposed.⁷⁸⁹ A defense is not interposed, however, so as to entitle plaintiff to an allowance where a defendant merely alleges that another defendant is indebted to him.⁷⁹⁰

— **On discontinuance.** Plaintiff may be required to pay an extra allowance as a condition of being allowed to discontinue, after issue joined.⁷⁹¹ And the fact that there is no issue

⁷⁸⁴ Rawlinson v. Brainerd & Armstrong Co., 53 App. Div. 147, 65 N. Y. Supp. 762.

⁷⁸⁵ Crossman v. Wyckoff, 64 App. Div. 554, 557, 72 N. Y. Supp. 337.

⁷⁸⁶ Code Civ. Proc. § 3253.

⁷⁸⁷ People v. Fitchburg R. Co., 133 N. Y. 239.

⁷⁸⁸ Strauss v. Union Cent. L. Ins. Co., 33 Misc. 571, 67 N. Y. Supp. 931, which, however, criticizes the rule.

⁷⁸⁹ New York El. R. Co. v. Harold, 30 Hun, 466; Vietor v. Halstead, 38 State Rep. 407, 60 Hun, 578, 14 N. Y. Supp. 516; Winne v. Fanning, 19 Misc. 410, 78 State Rep. 262, 44 N. Y. Supp. 262.

⁷⁹⁰ Defendorf v. Defendorf, 42 App. Div. 166, 59 N. Y. Supp. 163.

⁷⁹¹ Kilmer v. Evening Herald Co., 70 App. Div. 291, 75 N. Y. Supp. 243; Jaffray v. Goldstone, 62 Hun, 52, 16 N. Y. Supp. 430. Where an order of discontinuance was entered pursuant to a stipulation that it should be without prejudice to a motion for an extra allowance and if the allowance was granted and not paid defendant could move to vacate the order ex parte, the special term still had jurisdiction of the action to award an extra allowance. Harlem Bridge, M. & F. R. Co. v. Town Board of Westchester, 143 N. Y. 59. Where of three actions, two had been decided against plaintiff, an extra allowance on discontinuing the third was justifiable, although it had been stipulated that all three suits were to abide the result of the second. Stallman v. Kimberly, 33 State Rep. 813, 11 N. Y. Supp. 518.

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at the time of the discontinuance is immaterial if the cause has ever been at issue.⁷⁹² So the receiving costs of discontinuance does not necessarily prejudice a pending motion for an allowance.⁷⁹³ Where plaintiff is allowed to discontinue on payment of costs to be taxed, and of any extra allowance which may be awarded to the defendant, with leave to move therefor, defendant's right to move for the allowance is not precluded by plaintiff's failure to pay the costs as taxed.⁷⁹⁴

— **On dismissal for plaintiff's failure to appear.** An allowance may be granted on the dismissal of the complaint because of plaintiff's failure to appear.⁷⁹⁵

— **Where action abates.** Where an action abates by the death of plaintiff, an additional allowance should not be awarded to defendant where there is no reason to suppose that plaintiff would not have recovered if he had lived.⁷⁹⁶

— **Where judgment is rendered on frivolous pleading.** An allowance may be granted where judgment is rendered on a frivolous pleading.⁷⁹⁷

— **Where offer of judgment is made.** On the acceptance of an offer of judgment, an allowance may be awarded to the party accepting;⁷⁹⁸ and so where the offer is refused and the party does not recover a more favorable judgment, the party making the offer may be awarded an allowance.⁷⁹⁹

⁷⁹² Moulton v. Beecher, 11 Hun, 192.

⁷⁹³ Moulton v. Beecher, 1 Abb. N. C. 193, 52 How. Pr. 182; Id. 230; judgment affirmed 53 How. Pr. 86, 11 Hun, 192.

⁷⁹⁴ Folsom v. Van Wagner, 14 Abb. Pr. (N. S.) 44, 7 Lans. 309.

⁷⁹⁵ Mills v. Watson, 45 Super. Ct. (13 J. & S.) 591.

⁷⁹⁶ McKeen v. Fish, 33 Hun, 28.

⁷⁹⁷ First Nat. Bank of Plattsburgh v. Bush, 47 How. Pr. 78.

⁷⁹⁸ Coates v. Goddard, 34 Super. Ct. (2 J. & S.) 118; Safety Steam-Generator Co. v. Dickson Mfg. Co., 61 Hun, 335, 40 State Rep. 681, 21 Civ. Proc. R. (Browne) 329, 16 N. Y. Supp. 32. Contra, Davison v. Waring, 9 How. Pr. 254; Pool v. Osborn, 8 Civ. Proc. R. (Browne) 232, note.

⁷⁹⁹ Hirschsprung v. Boe, 20 Abb. N. C. 402, 13 Civ. Proc. R. (Browne) 125; Landon v. Van Etten, 57 Hun, 122, 32 State Rep. 439, 19 Civ. Proc. R. (Browne) 78, 10 N. Y. Supp. 802.

§ 2168. Basis of computation.

The question as to the basis of computation is involved in two ways. First, it is often objected that no allowance can be granted because there is no basis on which to compute the statutory percentage; second, conceding that there is a basis, it is contended that the basis on which computed is not the proper one. These two questions will be considered together. The Code provides that in an action to foreclose a mortgage, the basis of computation is the sum due or claimed to be due on the mortgage, while in any other action or special proceeding in which the allowance may be awarded and in which a defense has been interposed, the basis is "the sum recovered or claimed, or the value of the subject-matter involved."⁸⁰⁰ The phrase to be construed is "the sum recovered or claimed, or the value of the subject-matter involved." General rules will first be laid down and then the subject-matter of specific actions will be considered. Little trouble is experienced in common-law actions where damages are sought, since the amount demanded in the pleadings suffices as a basis if there is no judgment for plaintiff on the merits, while the amount of the verdict is the basis of the computation if plaintiff succeeds on the merits. In actions seeking equitable relief, however, there is considerable difficulty in determining what shall be the basis of computation where plaintiff is refused relief or where the decree awards him merely equitable relief. Of course if there is no basis of computation, no allowance can be awarded.⁸⁰¹

If a judgment for damages is recovered in a common-law action, the amount thereof is ordinarily the basis of computation, and an allowance may be awarded on the whole amount recovered though defendant admits a partial liability, on the trial.⁸⁰² The basis is the amount of the verdict without interest unless the court orders otherwise.⁸⁰³

Where there is no judgment on the merits in an action, if a

⁸⁰⁰ Code Civ. Proc. § 3253.

⁸⁰¹ *People v. Flagg*, 25 Barb. 652, 656.

⁸⁰² *Austin v. Hartwig*, 49 Super. Ct. (17 J. & S.) 256.

⁸⁰³ *Clegg v. Aikens*, 17 Abb. N. C. 88.

sum is demanded in the complaint, the amount may be based on the amount "claimed" therein.⁸⁰⁴ But it has been held that no allowance to "plaintiff" will be computed on the amount claimed in the complaint.⁸⁰⁵ The sum "claimed" does not refer to a merely formal claim for damages in an equity suit which has been either expressly or tacitly abandoned by the party.⁸⁰⁶ Where notice is served with the summons, that in case of default plaintiff will take judgment for a sum specified, this is his statement of the amount involved, so as to preclude him from claiming that there is no basis for computation of an allowance.⁸⁰⁷ The basis in an action for conversion, where the value of the property appeared on the trial, is such value and not the amount demanded in the complaint even where the allowance is granted to defendant.⁸⁰⁸

When there is no "sum recovered or claimed" the allowance must be based on "the value of the subject-matter involved."⁸⁰⁹ It follows that in such a case an allowance is not authorized (1) where the subject-matter involved is not capable of a money value or (2) where the value is not shown.⁸¹⁰ The word "involved," as used herein, means "affected."⁸¹¹ The subject-matter involved on which the percentage is to be computed is that which is to be directly affected by the result of the action.⁸¹² If damages are recovered, it would seem that the amount of damages is the basis rather than the value

⁸⁰⁴ *Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459; *People v. Bootman*, 95 App. Div. 469, 88 N. Y. Supp. 887, 892.

⁸⁰⁵ *Wilkinson v. Tiffany*, 4 Abb. Pr. 98.

⁸⁰⁶ *Deuterman v. Gainsborg*, 54 App. Div. 575, 581, 66 N. Y. Supp. 1009.

⁸⁰⁷ *Adams v. Arkenburg*, 106 N. Y. 615.

⁸⁰⁸ *Saratoga & W. R. Co. v. McCoy*, 9 How. Pr. 339.

⁸⁰⁹ *Husted v. Thomson*, 38 App. Div. 315, 57 N. Y. Supp. 9.

⁸¹⁰ *Bradley v. Walker*, 44 State Rep. 213, 22 Civ. Proc. R. (Browne) 1, 17 N. Y. Supp. 383; *Conaughty v. Saratoga County Bank*, 92 N. Y. 401.

⁸¹¹ *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305.

⁸¹² *People v. Albany & V. R. Co.*, 16 Abb. Pr. 465; *Coleman v. Chauncey*, 30 Super. Ct. (7 Rob.) 578.

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of the subject-matter involved if the damages are the principal thing, i. e., if the subject-matter is only incidentally involved.⁸¹³ For instance, in a purchaser's action to recover back the amount paid upon the contract and his expenses, on the ground of defective title, an extra allowance must be based upon the recovery of damages, the value of the subject-matter incidentally involved not being material.⁸¹⁴ It is not sufficient to sustain the allowance that the case was one where there might have been a pecuniary value to the "subject-matter," where the value is not shown and no evidence, admission, or proof given from which the court could arrive at a conclusion as to value.⁸¹⁵ For instance, where there is no evidence of the value of the leasehold property at the time of the trial, the possession of which is sought to be recovered, there is no basis for an allowance.⁸¹⁶ So where the subject-matter of the litigation is the right of the state to have the waters of a river flow free and unobstructed, no allowance can be granted in the absence of proof of the value of that right.⁸¹⁷ So, in an action to redeem from a forfeiture, no allowance can be awarded where the value of the property sought to be redeemed is not shown.⁸¹⁸ The fact that a possible money value may accrue incidentally does not warrant the granting of an allowance.⁸¹⁹ The statement of plaintiff's counsel in his opening address as to the amount involved may constitute a sufficient basis for an allowance.⁸²⁰

⁸¹³ Action to abate a nuisance. *Rothery v. New York Rubber Co.*, 90 N. Y. 30; *People v. Adams*, 128 N. Y. 129; *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 176.

⁸¹⁴ *Moore v. Appleby*, 108 N. Y. 237.

⁸¹⁵ *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 138 N. Y. 252, 257. Averment of value in answer, denied in reply, is insufficient. *Id.*

⁸¹⁶ *Werner v. Franklin Nat. Bank*, 49 App. Div. 423, 428, 63 N. Y. Supp. 383.

⁸¹⁷ *People v. Page*, 39 App. Div. 110, 122, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239.

⁸¹⁸ *Weeks v. Silver Islet Consol. Min. & Lands Co.*, 58 Super. Ct. (26 J. & S.) 247, 32 State Rep. 417, 19 Civ. Proc. R. (Browne) 87, 11 N. Y. Supp. 48.

⁸¹⁹ *Schneider v. Rochester*, 50 App. Div. 22, 25, 63 N. Y. Supp. 360.

⁸²⁰ *Rutty v. Person*, 6 Civ. Proc. R. (Browne) 25.

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In an action by one railroad company to determine the validity of a lease of its road to another, the subject-matter is the lease and not the value of the road.⁸²¹ In an action to determine the validity of a contract, the "subject-matter involved" is the whole claim, and not the profits which might have been made on such contract.⁸²² In an action involving an annuity, an allowance is to be based upon the value of the amount due for past instalments, and not upon the value of future instalments.⁸²³ Where an action involves shares of bank stock, the value of which is not proven, the court will assume that they are worth their par value, and an allowance will be based upon such valuation and cannot exceed it.⁸²⁴

There is a basis for computation in an action to foreclose a mechanic's lien,⁸²⁵ but not in an action for a divorce or a separation,⁸²⁶ nor in an action merely to reform a written instrument,⁸²⁷ nor in an action to try title to office,⁸²⁸ nor in an action to remove an officer for misconduct,⁸²⁹ nor in an action to set aside an award where no valuation can be placed on the award.⁸³⁰

⁸²¹ *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 176.

⁸²² *Mingay v. Holly Mfg. Co.*, 99 N. Y. 270.

⁸²³ *Arthur v. Dalton*, 14 App. Div. 115, 43 N. Y. Supp. 581.

⁸²⁴ *Smith v. Baker*, 42 Hun, 504.

⁸²⁵ *Lawson v. Reilly*, 13 Civ. Proc. R. (Browne) 290; *Horgan v. McKenzie*, 43 State Rep. 131, 17 N. Y. Supp. 174.

⁸²⁶ Sum for counsel fees may be ordered paid. *Bentley v. Bentley*, 3 Month. Law Bul. 76; *Van Vleck v. Van Vleck*, 21 App. Div. 272, 47 N. Y. Supp. 470; *Pountney v. Pountney*, 32 State Rep. 335, 10 N. Y. Supp. 192.

⁸²⁷ *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063. See, also, *Christopher & Tenth St. R. Co. v. Twenty-Third St. R. Co.*, 48 State Rep. 805, 20 N. Y. Supp. 556.

⁸²⁸ *People v. Flagg*, 25 Barb. 652.

⁸²⁹ *People v. Adams*, 128 N. Y. 129. No allowance can be granted in an action for the removal of a president of an insurance company for misconduct, although there is an allegation in the complaint that money has been lost by the mismanagement of the defendant, if the plaintiff claims no interest in it. *People v. Giroux*, 29 Hun, 248. So in an action to remove an assignee for creditors. *Meyer v. Rasquin*, 20 Wkly. Dig. 98.

⁸³⁰ *Hoffman v. De Graaf*, 39 Hun, 648.

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— **Where counterclaim is interposed.** Where a defendant recovers on a counterclaim, his extra allowance is not limited to a per cent on the amount of the counterclaim, but it may be computed on the amount of the plaintiff's claim.⁸³¹ So plaintiff may have an extra allowance not only upon the sum recovered in the action, but upon the basis of the counterclaim determined against defendant.⁸³² But if defendant sets up a counterclaim and recovers any sum thereon, plaintiff cannot be awarded any allowance for any amount on the counterclaim.⁸³³ And where a counterclaim is not submitted to the jury plaintiff is not entitled to an allowance based upon the counterclaim, as he has never been called upon to meet it either by reply, or by evidence on the trial.⁸³⁴

— **Where one sues for a part of a fund.** The share claimed by plaintiff, not the whole fund or interest, is the basis where one sues for himself alone or where he sues for himself and all others similarly situated where no others come in as plaintiffs;⁸³⁵ except that in partition the value of the whole property, and not that of plaintiff's share only, is the subject-matter involved.⁸³⁶

— **Actions in general where injunctive relief is sought.** An allowance cannot be awarded in an action where injunctive relief is sought unless damages are claimed or recovered or

⁸³¹ *Vilmar v. Schall*, 61 N. Y. 564.

⁸³² *Woonsocket Rubber Co. v. Rubber Clothing Co.*, 62 How. Pr. 180; *Barclay v. Culver*, 4 Civ. Proc. R. (Browne) 365, 66 How. Pr. 342; *Lissberger v. Schoenberg Metal Co.*, 2 City-Ct. R. 158.

⁸³³ *Bates v. Fish Bros. Wagon Co.*, 50 App. Div. 38, 44, 63 N. Y. Supp. 649.

⁸³⁴ *Knauth v. Wertheim*, 26 Abb. N. C. 369, 14 N. Y. Supp. 391; *Barnes v. Denslow*, 30 State Rep. 315, 9 N. Y. Supp. 53.

⁸³⁵ *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305; *Mills v. Ross*, 39 App. Div. 563, 57 N. Y. Supp. 680; *Devlin v. City of New York*, 15 Abb. Pr. (N. S.) 31. In an action by a partner against his co-partners, to secure a one-fourth interest in a lease, alleged to belong to the firm, the value of such one-fourth, and not of the entire lease, is the proper basis of an allowance to plaintiff. *Struthers v. Pearce*, 51 N. Y. 365.

⁸³⁶ *Doremus v. Crosby*, 66 Hun, 125, 20 N. Y. Supp. 906.

the value of the subject-matter is shown.⁸³⁷ The basis is usually the subject-matter involved. For instance, if the action is to restrain the violation of an easement, the value of the easement is the proper basis.⁸³⁸ There is no basis in an action brought solely to restrain another action,⁸³⁹ nor in an action to enjoin a breach of an agreement not to carry on business within a certain territory,⁸⁴⁰ nor in an action to restrain officers from acting until their title to the office can be adjudicated,⁸⁴¹ nor in an action to enjoin interference with an easement where the value of such easement is not proved,⁸⁴² nor to enjoin the erection of a pier,⁸⁴³ nor to enjoin the violation of a covenant,⁸⁴⁴ nor to enjoin the running of cars in violation of a contract,⁸⁴⁵ nor to enjoin the diverting or polluting of a stream,⁸⁴⁶ nor to enjoin a railroad company from building the road along the line adopted by it.⁸⁴⁷ So, in an action to restrain increasing the height of a party wall, if the plaintiff claims no right or property in the materials used or the value of the erections, there is no basis for an additional allowance.⁸⁴⁸ So where no evidence was presented as to the value of the property right in a name used to represent the joint business of plaintiff and a defendant which it was claimed plaintiff had appropriated and the use of which defendant de-

⁸³⁷ See *Black v. Brooklyn Heights R. Co.*, 32 App. Div. 468, 474, 53 N. Y. Supp. 312; *Kitching v. Brown*, 181 N. Y. —.

⁸³⁸ *Lattimer v. Livermore*, 72 N. Y. 174.

⁸³⁹ *Sprong v. Snyder*, 6 How. Pr. 11; *Powers v. Wolcott*, 12 How. Pr. 565.

⁸⁴⁰ *Diamond Match Co. v. Roeber*, 35 Hun, 421, 430.

⁸⁴¹ *Voorhis v. French*, 47 Super. Ct. (15 J. & S.) 364.

⁸⁴² Easement is subject-matter involved. *Johnson v. Shelter Island Grove & Camp Meeting Ass'n*, 122 N. Y. 330.

⁸⁴³ *People v. New York & S. I. Ferry Co.*, 68 N. Y. 71.

⁸⁴⁴ *Bradley v. Walker*, 44 State Rep. 213, 22 Civ. Proc. R. (Browne) 1, 17 N. Y. Supp. 383; *Atlantic Dock Co. v. Libby*, 45 N. Y. 499.

⁸⁴⁵ *Christopher & Tenth St. R. Co. v. Twenty-third St. R. Co.*, 48 State Rep. 805, 20 N. Y. Supp. 556.

⁸⁴⁶ *Godley v. Kerr Salt Co.*, 3 App. Div. 17, 37 N. Y. Supp. 988.

⁸⁴⁷ *People v. Genesee Valley Canal R. Co.*, 95 N. Y. 666.

⁸⁴⁸ *Musgrave v. Sherwood*, 29 Hun, 475.

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manded to have restrained, no extra allowance can be granted to defendant.⁸⁴⁹

There is no basis in an action to restrain the continuance of a nuisance where no damages are demanded, notwithstanding it is shown by affidavit that the property of defendant is valued at a certain sum and that if plaintiff succeeded its value would be a certain smaller sum.⁸⁵⁰ But if it is sought to enjoin the operation of a plant in any way whatever, the value of the property is the subject-matter of the action.⁸⁵¹

The basis is the value of the trade mark in an infringement case where plaintiff succeeds, on the issue as to the right to the trade mark,⁸⁵² provided the value thereof is shown,⁸⁵³ but if defendant succeeds on the issue as to the trade mark right, it follows that no value can be attached to plaintiff's alleged trade mark right which is the subject-matter involved.⁸⁵⁴

If, in an injunction suit, title to the property in dispute is affected by the judgment, the value thereof may be the basis.⁸⁵⁵ But if, in an action to restrain the execution of a final determination in forcible entry proceedings, the leasehold interest is the principal subject and the title of the lessor only incidental, the percentage must be estimated on the leasehold value.⁸⁵⁶

⁸⁴⁹ *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 138 N. Y. 252.

⁸⁵⁰ *Godley v. Kerr Salt Co.*, 3 App. Div. 17, 37 N. Y. Supp. 988.

⁸⁵¹ *Empire City Subway Co. v. Broadway & S. A. R. Co.*, 87 Hun, 279, 33 N. Y. Supp. 1055.

⁸⁵² *Perkins v. Heert*, 14 Misc. 425, 36 N. Y. Supp. 424. The allowance is not to be computed merely on the amount of damages recovered. *Munro v. Smith*, 23 Abb. N. C. 275, 25 State Rep. 624, 6 N. Y. Supp. 426, 17 Civ. Proc. R. (Browne) 158. See, as contra, *Collins v. Reynolds Card Mfg. Co.*, 2 Month. Law Bul. 45.

⁸⁵³ *De Long v. De Long Hook & Eye Co.*, 89 Hun, 399, 406, 35 N. Y. Supp. 509. In *Volger v. Force*, 63 App. Div. 122, 71 N. Y. Supp. 209, it is held that there is no basis, where no damages are awarded, in the absence of proof of injury to the trade mark, decrease in the amount of sales, or decrease in profits.

⁸⁵⁴ *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 63 Hun, 297, 17 N. Y. Supp. 786; *Dunlap & Co. v. Young*, 68 App. Div. 137, 74 N. Y. Supp. 184.

⁸⁵⁵ *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305.

⁸⁵⁶ *Sheehy v. Kelly*, 33 Hun, 543.

The incidental damage likely to be occasioned is not the basis.⁵⁵⁷

— **Actions where franchise is involved.** In actions where a franchise is the subject-matter of the action, as in an action to dissolve a corporation, an allowance may be awarded only where there is evidence of the value of the franchise.⁵⁵⁸

— **Actions by abutting owners.** In an abutter's action, the sum assessed as "fee damages" represents the value of the subject-matter involved.⁵⁵⁹ The amount claimed in the complaint, where denied in the answer, forms no basis.⁵⁶⁰ If no damages are awarded, proof must be given of the value of the subject-matter, in order to afford a basis for an additional allowance to plaintiff.⁵⁶¹

— **Taxpayer's action.** An allowance may be granted either to defendant⁵⁶² or plaintiff,⁵⁶³ if there is any basis for computation. The basis in a taxpayer's action to enjoin the auditing or payment of a bill is the amount of the claim.⁵⁶⁴ So, in an action to enjoin the carrying out of a contract to pay a certain sum, such sum is the subject-matter.⁵⁶⁵

— **Actions to cancel written instruments.** Where there is a value involved which may be ascertained, an allowance may

⁵⁵⁷ *Rochester & H. V. R. Co. v. Rochester*, 17 App. Div. 257, 45 N. Y. Supp. 687.

⁵⁵⁸ *Hudson River Tel. Co. v. Watervliet Turnpike & R. Co.*, 135 N. Y. 393; *People v. Ulster & D. R. Co.*, 128 N. Y. 240; *Conaughty v. Saratoga County Bank*, 92 N. Y. 401; *People v. Rockaway Beach Imp. Co.*, 28 Hun, 356. The state tax upon the corporate franchise and business of a corporation furnishes no evidence of the value of the franchise upon which to base an additional allowance. *People v. Ulster & D. R. Co.*, *supra*.

⁵⁵⁹ *Dode v. Manhattan R. Co.*, 70 Hun. 374, 24 N. Y. Supp. 422.

⁵⁶⁰ *Israel v. Metropolitan R. Co.*, 10 Misc. 722, 31 N. Y. Supp. 816.

⁵⁶¹ *Black v. Brooklyn Heights R. Co.*, 32 App. Div. 468, 53 N. Y. Supp. 312.

⁵⁶² *Gordon v. Strong*, 15 App. Div. 519, 44 N. Y. Supp. 481; *Freeman v. Brooks*, 33 Misc. 450, 68 N. Y. Supp. 437.

⁵⁶³ *Chase v. Syracuse*, 34 Misc. 144, 69 N. Y. Supp. 469.

⁵⁶⁴ The fact that the claimants were not parties to the action is immaterial. *Freeman v. Brooks*, 33 Misc. 450, 68 N. Y. Supp. 437.

⁵⁶⁵ *Barker v. Town of Oswegatchie*, 62 Hun, 208, 16 N. Y. Supp. 734.

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be awarded in an action to cancel a written instrument. Thus, where plaintiff succeeded in an action to compel the cancellation of certain bonds, on the ground that they were invalid and void, but the validity of which defendant maintained, and on which he claimed a lien for money paid, there was sufficient evidence of value to entitle the plaintiff to an allowance.⁸⁶⁶ But where the complaint is dismissed and the value of the bonds sought to be canceled is not shown, there is no basis for an allowance.⁸⁶⁷

— **Actions for specific performance.** In this action the value of the property is the basis of computation.⁸⁶⁸

— **Actions to declare a deed a mortgage.** The allowance may be computed on the value of the property affected by the litigation.⁸⁶⁹

— **Actions to quiet title.** An extra allowance cannot be granted in an action to set aside a conveyance as a cloud upon title, where no money claim is made and nothing but the validity of the deed is involved.⁸⁷⁰

— **Actions relating to fraudulent conveyances.** In a creditors' suit, the allowance must be based on the amount due on the judgment and not on the value of the land.⁸⁷¹ However, there is no basis for an allowance where, though the title is incidentally involved, the real controversy is concerning plain-

⁸⁶⁶ Sickles v. Richardson, 14 Hun, 110.

⁸⁶⁷ Wood v. Lary, 47 Hun, 550.

⁸⁶⁸ Lahey v. Kortright, 58 Super. Ct. (26 J. & S.) 576, 32 State Rep. 112, 19 Civ. Proc. R. (Browne) 80, 11 N. Y. Supp. 47.

⁸⁶⁹ Burke v. Candee, 63 Barb. 552.

⁸⁷⁰ Donovan v. Wheeler, 67 Hun, 68, 22 N. Y. Supp. 54.

⁸⁷¹ National Tradesmen's Bank v. Wetmore, 10 State Rep. 640; Potter v. Farrington, 24 Hun, 551; New Mfg. Co. v. Galway, 23 Civ. Proc. R. (Browne) 239, 26 N. Y. Supp. 950; Remington Paper Co. v. O'Dougherty, 18 Wkly. Dig. 190. In a judgment creditor's suit to set aside a conveyance as being in fraud of creditors, the subject involved cannot exceed the amount of the lien of the plaintiff's judgment, and an extra allowance to the defendant as a condition of dismissing the action in excess of five per cent. upon that amount is unauthorized. McConnell v. Manhattan Const. Co., 16 Civ. Proc. R. (Browne) 310, 21 State Rep. 870, 4 N. Y. Supp. 226.

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tiff's interest therein, concerning the value of which there is no proof.⁸⁷²

— **Actions involving an accounting.** In an action for an accounting, no fixed or definite sum being claimed in the complaint as due to the plaintiff, no extra allowance can be granted upon the dismissal of the complaint.⁸⁷³ In an action by one partner against his co-partner to dissolve a partnership and for an accounting, where the firm is insolvent, there is no basis for an allowance; but if the firm is solvent, the amount involved is the proportion of the firm assets to which plaintiff has shown himself to be entitled.⁸⁷⁴ And if, though the firm is insolvent, plaintiff seeks to recover for advances made to defendant in the firm business, there is a basis for an allowance though there is no judgment on the merits.⁸⁷⁵ But if, in an action for an accounting of an alleged partnership, the court finds that there is no partnership and no proof is given of the value of any matters as to which an accounting was asked, there is nothing upon which to base an additional allowance.⁸⁷⁶ In an action for an accounting against a bank with which trust moneys of the estate have been deposited, the subject-matter is the deposit of trust moneys during the period in controversy.⁸⁷⁷

— **Actions relating to wills.** In an action to set aside the probate of a will, an allowance may be awarded though plaintiff fails to prosecute,⁸⁷⁸ or though a verdict is directed for defendants.⁸⁷⁹ The amount of the estate furnishes a basis for

⁸⁷² *Maloy v. Associated Lace Makers' Co.*, 25 State Rep. 735, 7 N. Y. Supp. 958.

⁸⁷³ *Budd v. Smales*, N. Y. Daily Reg. March 19, 1884. See, also, *Knapp v. Hammersley*, 13 Civ. Proc. R. (Browne) 258.

⁸⁷⁴ *Adams v. Arkenburgh*, 106 N. Y. 615; *Weaver v. Ely*, 83 N. Y. 89. If firm is solvent, and partner has died, the share of his personal representatives is the basis. *Slater v. Slater*, 99 App. Div. 469, 91 N. Y. Supp. 269.

⁸⁷⁵ *Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459.

⁸⁷⁶ *Adams v. Sullivan*, 42 Hun. 278.

⁸⁷⁷ Amount of deposits, so far as proved, held the value of subject-matter involved. *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 172, 61 N. Y. Supp. 258.

⁸⁷⁸ *Delmar v. Delmar*, 65 App. Div. 582, 72 N. Y. Supp. 959.

⁸⁷⁹ *Haughian v. Contan*, 86 App. Div. 290, 83 N. Y. Supp. 830.

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computation.⁸⁸⁰ In an action to construe a will, an allowance may be awarded to either party or to all the parties,⁸⁸¹ except that if defendant's demurrer to the complaint is sustained on the ground that no cause of action is stated, there is no basis for an extra allowance.⁸⁸²

— **Actions relating to policy of insurance.** The basis in an action to set aside a cancellation and reinstate a policy is the present or surrender value of the policy.⁸⁸³ In an action on a Lloyds policy of insurance, the basis is the amount sought to be recovered of the defendant sued, and not the amount of plaintiff's loss.⁸⁸⁴

— **Actions for trespass.** The sum demanded in the complaint in an action for trespass may be taken as the basis of an allowance against the plaintiff where he defaults.⁸⁸⁵ So where it is alleged that defendant has taken \$700,000 of mineral out of plaintiff's mine and has sold and received therefor more than \$250,000, the smaller sum may, at least, be regarded as "the amount claimed or the value of the subject-matter involved."⁸⁸⁶ The allowance may be computed on the value of the property instead of on the amount of damages where the question of title is the main issue.⁸⁸⁷

— **Partition suit.** The property sought to be partitioned is the subject-matter involved in a partition suit.⁸⁸⁸ An allow-

⁸⁸⁰ *Delmar v. Delmar*, 65 App. Div. 582, 72 N. Y. Supp. 959; *Seagrist v. Sigrist*, 20 App. Div. 336, 46 N. Y. Supp. 949.

⁸⁸¹ *Allen v. Stevens*, 161 N. Y. 123. *Contra*, *Hafner v. Hafner*, 34 Misc. 99, 69 N. Y. Supp. 460. But if plaintiff is successful, he is the only person entitled. *Brinckerhoff v. Farias*, 52 App. Div. 256, 65 N. Y. Supp. 358.

⁸⁸² *Opitz v. Hammen*, 41 App. Div. 468, 58 N. Y. Supp. 987. See, also, *Perkins v. Whitney*, 34 State Rep. 951, 12 N. Y. Supp. 184.

⁸⁸³ *Strauss v. Union Cent. L. Ins. Co.*, 33 Misc. 571, 67 N. Y. Supp. 931.

⁸⁸⁴ *Laird v. Littlefield*, 34 App. Div. 43, 53 N. Y. Supp. 1082.

⁸⁸⁵ *Sentenis v. Ladew*, 140 N. Y. 463.

⁸⁸⁶ *Abbey v. Wheeler*, 57 App. Div. 417, 68 N. Y. Supp. 252.

⁸⁸⁷ *Warren v. Buckley*, 2 Abb. N. C. 323; *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305.

⁸⁸⁸ *Doremus v. Crosby*, 66 Hun, 125, 20 N. Y. Supp. 906.

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ance may be made to defendant in partition though a judgment of actual partition is rendered.⁸⁸⁹

—**Ejectment.** In ejectment, the value of the property sought to be recovered is the basis of computation. This is so in so far as an allowance to defendant is concerned, though on the trial plaintiff waived his claim to a part of the premises.⁸⁹⁰ It follows that if there is no proof of the value of the property, there is no basis for computation.⁸⁹¹ except that where a verdict is directed for defendant, the allowance may be computed on the amount of damages claimed in the complaint.⁸⁹²

—**Actions to recover damages for death by wrongful act.** If an extra allowance is granted immediately after a verdict is rendered in an action to recover damages for death by wrongful act, the computation is to be merely on the amount of the verdict and not also on the interest.⁸⁹³ unless the court orders the allowance to cover the interest as well as the verdict.⁸⁹⁴

§ 2169. Amount.

The Code fixes the amount of the allowance as follows:

“1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

“2. In any action or special proceeding specified in this section, where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per

⁸⁸⁹ Crossman v. Wyckoff, 64 App. Div. 554, 72 N. Y. Supp. 337.

⁸⁹⁰ Burton v. Tremper, 10 State Rep. 629.

⁸⁹¹ In an action by a lessee, where there is no evidence of the value of the possession over and above the amount of rent reserved by the lease, there is no basis for the computation of an allowance. Heilman v. Lazarus, 90 N. Y. 672.

⁸⁹² Rank v. Grote, 50 Super. Ct. (18 J. & S.) 275.

⁸⁹³ Seifter v. Brooklyn Heights R. Co., 53 App. Div. 443, 65 N. Y. Supp. 1123; Linne v. New York City, 8 Civ. Proc. R. (Browne) 252, note.

⁸⁹⁴ See Clegg v. Aikens, 17 Abb. N. C. 88.

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centum upon the sum recovered or claimed, or the value of the subject-matter involved.”⁸⁹⁵

Only five per cent in the aggregate and not five per cent to each party may be awarded.⁸⁹⁶

Furthermore, all the sums awarded to the plaintiff, as a matter of right, or to a party or two or more parties on the same side, cannot exceed, in the aggregate, two thousand dollars.⁸⁹⁷

Prior to 1898, the extra allowance in a mortgage foreclosure suit could not exceed two hundred dollars,⁸⁹⁸ but the Code amendment of that year permits an allowance of five per cent as in other cases, where a defense has been interposed.⁸⁹⁹ In other words, five per cent is now the limit in every case where the award is discretionary except in an action to foreclose a mortgage on real property where no defense has been interposed in which two hundred dollars is the limit.⁹⁰⁰ The limitation in amount does not apply to a mortgage on “personal” property such as a leasehold,⁹⁰¹ though it does apply to a mortgage on both real and personal property where the chief purpose of the action is to foreclose a mortgage on real property.⁹⁰²

The court may, in its discretion, fix the allowance at less than the statutory percentage,⁹⁰³ but not in excess thereof even though the attorneys consent.⁹⁰⁴ However, in an equitable action, the court may, in the exercise of its inherent power as a court of equity, award an extra allowance to the

⁸⁹⁵ Code Civ. Proc. § 3253.

⁸⁹⁶ *Doremus v. Crosby*, 66 Hun, 125, 20 N. Y. Supp. 906; *New York Breweries Co. v. Nichols*, 72 Hun, 638, 55 State Rep. 179, 25 N. Y. Supp. 425.

⁸⁹⁷ Code Civ. Proc. § 3254.

⁸⁹⁸ *Waterbury v. Tucker & C. Cordage Co.*, 152 N. Y. 610.

⁸⁹⁹ *Long Island L. & T. Co. v. Long Island City & N. R. Co.*, 85 App. Div. 36, 40, 82 N. Y. Supp. 644.

⁹⁰⁰ See *Defendorf v. Defendorf*, 42 App. Div. 166, 59 N. Y. Supp. 163.

⁹⁰¹ *Huntington v. Moore*, 59 Hun, 351, 13 N. Y. Supp. 97; *Barnes v. Meyer*, 75 State Rep. 694, 25 Civ. Proc. R. (Scott) 372, 41 N. Y. Supp. 210.

⁹⁰² *Waterbury v. Tucker & C. Cordage Co.*, 152 N. Y. 610.

⁹⁰³ *Rensselaer & S. R. Co. v. Davis*, 55 N. Y. 145, 149.

⁹⁰⁴ *Bockes v. Hathorn*, 17 Hun, 87.

guardian ad litem of infant defendants in excess of the five per cent.⁹⁰⁵ The motive in suing or defending does not authorize an allowance in excess of that permitted by the Code.⁹⁰⁶ The allowance should be what the court may deem a reasonable counsel fee in the cause,⁹⁰⁷ and not cover the expenses on appeal.⁹⁰⁸ The allowance is by way of indemnity for actual expenses necessarily or reasonably incurred in the action over and above the amount covered by the allowances fixed in the statute.⁹⁰⁹ The allowance is not merely to compensate for labor on the trial but also for the skill, labor, and expense before trial.⁹¹⁰ It would seem that if there is no trial, that fact should be considered in determining the amount of the allowance.⁹¹¹

§ 2170. Procedure to obtain.

When the allowance is a matter of right, the clerk taxes it as of course without application to the court but in the class of cases now under consideration where the allowance is discretionary an application must always be made to the court. In an equity case, the provision as to an extra allowance is often included in the conclusions of law in the decision.

— **Before whom to move.** The motion must be made to the court before which the trial is had or the judgment ren-

⁹⁰⁵ Such allowance is not by authority of the Code provision. *Roberts v. New York El. R. Co.*, 12 Misc. 345, 23 N. Y. Supp. 685.

⁹⁰⁶ *McConnell v. Manhattan Const. Co.*, 16 Civ. Proc. R. (Browne) 310, 4 N. Y. Supp. 226.

⁹⁰⁷ *Perkins v. Heert*, 14 Misc. 425, 36 N. Y. Supp. 434. Allowance of \$2,000 held excessive. *Hagenbuehle v. Schultz*, 69 Hun, 183, 23 N. Y. Supp. 611; *Gordon v. Strong*, 15 App. Div. 519, 44 N. Y. Supp. 481. Allowance of \$1,000 held excessive. *Sherman v. Grinnell*, 70 Hun, 354, 24 N. Y. Supp. 59; *People v. Rochester Dime Sav. & Loan Ass'n*, 7 App. Div. 350, 39 N. Y. Supp. 939.

⁹⁰⁸ *People v. New York Cent. R. Co.*, 30 How. Pr. 148.

⁹⁰⁹ *People v. New York Cent. R. Co.*, 29 N. Y. 418.

⁹¹⁰ *McQuade v. New York & E. R. Co.*, 11 How. Pr. 434, 12 Super. Ct. (5 Duer) 613.

⁹¹¹ *Lockwood v. Salmon River Paper Co.*, 49 State Rep. 303, 20 N. Y. Supp. 974.

Art. V. Amount.—D. Additional Allowances.—2. As of Discretion.

dered,⁹¹² and, if the case was not tried by a referee, to the judge who presided at the trial.⁹¹³ The latter requirement is not jurisdictional, however, and the objection is waived where not urged when the motion is argued.⁹¹⁴ The motion cannot be made before the appellate division,⁹¹⁵ nor before the referee who tried the case.⁹¹⁶ In such cases the motion should be made at special term. Lapse of time may, however, preclude the right to attack the order because made by the appellate division.⁹¹⁷

— **Time for application.** The motion is usually made at the close of the trial. The application must be made before final costs are adjusted,⁹¹⁸ i. e., before entry of judgment.⁹¹⁹ But this rule does not prevent a party who has taxed costs under an interlocutory judgment from applying for an allow-

⁹¹² Rule 45 of General Rules of Practice; *Toch v. Toch*, 9 App. Div. 501, 41 N. Y. Supp. 353.

⁹¹³ *Hun v. Salter*, 24 Hun, 640; *Wiley v. Long Island R. Co.*, 88 Hun, 177, 34 N. Y. Supp. 415. But in *Wilber v. Williams*, 4 App. Div. 444, 38 N. Y. Supp. 893, it was held that where the complaint was dismissed on motion and there was no protracted trial, the motion being made before a judge who had about as much information as to the nature of the issue and of what transpired on the occasion of the dismissal as the trial judge, the rule did not apply.

⁹¹⁴ *Wilber v. Williams*, 4 App. Div. 444, 38 N. Y. Supp. 893; *Wiley v. Long Island R. Co.*, 88 Hun, 177, 34 N. Y. Supp. 415.

⁹¹⁵ This is so even where exceptions are heard in the first instance by the appellate division. *Riverside Bank v. Jones*, 75 App. Div. 531, 78 N. Y. Supp. 325; *Moskowitz v. Hornberger*, 20 Misc. 558, 564, 46 N. Y. Supp. 462.

⁹¹⁶ *Pinkser v. Pinkser*, 44 App. Div. 501, 60 N. Y. Supp. 902; *Howe v. Muir*, 4 How. Pr. 252.

⁹¹⁷ *Griggs v. Brooks*, 79 Hun, 394, 29 N. Y. Supp. 794.

⁹¹⁸ Rule 45 of General Rules of Practice; *Commissioners of Pilots v. Spofford*, 3 Hun, 57. A motion for an additional allowance cannot be granted after the adjustment of the costs of the action, and the effect of such adjustment is not changed in any manner by the fact that other costs awarded on an application to open a default are still to be adjusted. *Jones v. Wakefield*, 21 Wkly. Dig. 287.

⁹¹⁹ *Winne v. Fanning*, 19 Misc. 410, 44 N. Y. Supp. 262; *Martin v. McCormick*, 5 Super. Ct. (3 Sandf.) 755; *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305. See, also, *Trimm v. Marsh*, 4 T. & C. 577.

ance before entry of final judgment.⁹²⁰ So the court will open a taxation of costs for the purpose of enabling the prevailing party to move for an allowance.⁹²¹ And entry of judgment without costs being taxed does not waive the right to move.⁹²² But parties cannot abandon a bill of costs already adjusted and served in order to commence *de novo* for the purpose of seeking an allowance.⁹²³ After acceptance of a tender which included the costs of the action, an allowance cannot be granted.⁹²⁴

Where a party is defeated upon the trial of an action, and has therefore had no occasion or opportunity to ask for an allowance, but succeeds, upon an appeal to the court of appeals, in obtaining a favorable judgment, the special term may, upon application, after the filing of the remittitur and the entering of an order thereon, grant to such party the costs of the action and an additional allowance.⁹²⁵ When the court of appeals affirms and awards costs in the trial court, a motion may be made at special term for an extra allowance.⁹²⁶

— **Notice of application.** Whether a formal notice of an application for an allowance is necessary depends on when the application is made. If the application is made when the verdict is rendered, or during the trial, notice is not necessary.⁹²⁷ If made thereafter, notice is necessary.⁹²⁸ If notice is necessary and there is more than one plaintiff or one defendant, all of them must be given notice of the application.⁹²⁹

⁹²⁰ *Abbey v. Wheeler*, 57 App. Div. 417, 68 N. Y. Supp. 252; *Williams v. Kiernan*, 4 Month. Law Bul. 41.

⁹²¹ *Thompson v. St. Nicholas Nat. Bank*, 54 Hun, 393, 27 State Rep. 186, 7 N. Y. Supp. 491; *Dietz v. Farish*, 43 Super. Ct. (11 J. & S.) 87.

⁹²² *Williams v. Western Union Tel. Co.*, 61 How. Pr. 305, 309.

⁹²³ *Commissioners of Pilots v. Spofford*, 4 Hun, 74.

⁹²⁴ *Lockman v. Ellis*, 58 How. Pr. 100.

⁹²⁵ *Brown v. Farmers' Loan & Trust Co.*, 24 Abb. N. C. 160, 18 Civ. Proc. R. (Browne) 131, 9 N. Y. Supp. 337; *Parrott v. Sawyer*, 26 Hun, 466; *Barnard v. Hall*, 143 N. Y. 339.

⁹²⁶ *Hascall v. King*, 165 N. Y. 288.

⁹²⁷ *Mautner v. Pike*, 32 Misc. 500, 66 N. Y. Supp. 387; *Mann v. Tyler*, 6 How. Pr. 235; *Mitchell v. Hall*, 7 How. Pr. 490.

⁹²⁸ *Howe v. Muir*, 4 How. Pr. 252.

⁹²⁹ *Bush v. O'Brien*, 52 App. Div. 452, 65 N. Y. Supp. 131.

— **Motion papers.** If the motion is made before the trial judge at the trial or shortly after the rendition of the verdict, no motion papers are necessary. If the motion is made at special term, affidavits showing the right to the allowance should be made and served. If the hearing was before a referee and the allowance is claimed on the ground that the case was difficult and extraordinary, his certificate to that effect should be presented in addition to the other affidavits. But the certificate of the referee that the case was difficult and extraordinary is not jurisdictional, and the court may pass upon the motion without it.⁹³⁰ The value of the subject-matter involved, if it does not appear at the trial, may be shown by affidavit.⁹³¹ The pleadings, however, furnish the sole evidence as to what was the subject-matter involved.⁹³² The pleadings and affidavits determine the sum involved.⁹³³

— **Second application.** An order denying an application for an extra allowance is not a bar to a second application for such an order after another trial, and upon facts materially different from those on the first application.⁹³⁴

— **Order.** Where the clerk has before him, on taxation, the minutes kept by the deputy clerk, together with his affidavit that the court ordered an allowance to be made to a party, that is sufficient, without any written order, to authorize him to insert such allowance in the judgment.⁹³⁵ The order should not ordinarily allow costs of the motion.⁹³⁶ When granted, the sum allowed is included in the bill of costs and inserted in the judgment roll as a part of the judgment. The allowance is collectible by force of the judgment.

⁹³⁰ *Dode v. Manhattan R. Co.*, 70 Hun, 374, 24 N. Y. Supp. 422.

⁹³¹ *Hayden v. Mathews*, 4 App. Div. 338, 38 N. Y. Supp. 905; *People v. Rochester Dime Sav. Ass'n*, 7 App. Div. 350, 39 N. Y. Supp. 939.

⁹³² *Conaughy v. Saratoga County Bank*, 92 N. Y. 401, 404.

⁹³³ *Proctor v. Soulier*, 8 App. Div. 69, 40 N. Y. Supp. 459.

⁹³⁴ *Fox v. Fox*, 24 How. Pr. 385.

⁹³⁵ *Smith v. Coe*, 30 Super. Ct. (7 Rob.) 477.

⁹³⁶ *Schwartz v. Poughkeepsie Mut. F. Ins. Co.*, 10 How. Pr. 93.

Art. V. Amount.—D. Additional Allowances.—2. As of Discretion.

— Form of order.

[Title of cause.]

At a ——— term, etc.

The above-entitled action having been brought on for trial at the above-mentioned term of this court and a jury having rendered a verdict of ——— dollars for the ———, and against the ———, and ——— of counsel for the ——— having made a motion before the court for an extra allowance of costs on the ground that said action is an extraordinary and difficult cause, and said motion having been entertained by the court, and after hearing said ——— for said motion and ———, in opposition thereto:

Ordered, that said motion be, and the same hereby is, granted and the said plaintiff is hereby granted an extra allowance of costs in said action of ——— per cent on said ——— dollars, amounting to the sum of ———.

— **Appeal.** The order granting an allowance is appealable to the appellate division.⁹³⁷ So the propriety of the allowance may be reviewed on an appeal from the judgment,⁹³⁸ if the appeal is from the whole judgment or from the portions of it including the additional allowances.⁹³⁹ However, the appellate division rarely interferes with the discretion exercised by the trial court,⁹⁴⁰ though sometimes it reduces the amount of the allowance. The court of appeals cannot review the question whether the trial court has abused its discretion in awarding an extra allowance, but may consider on appeal whether the trial court had the power to grant "any" additional allowance.⁹⁴¹ That the allowance is, by inadvertence, excessive, may be corrected on appeal,⁹⁴² though the usual procedure is by a motion to correct the judgment.⁹⁴³

⁹³⁷ *Duncan v. De Witt*, 7 Hun, 184.

⁹³⁸ See *United Press v. New York Press Co.*, 164 N. Y. 406, 414; *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 138 N. Y. 252. So, in court of appeals, exception in lower court is not necessary.

⁹³⁹ *New York L. Ins. Co. v. Baker*, 38 App. Div. 417, 56 N. Y. Supp. 618.

⁹⁴⁰ *Abell v. Bradner*, 39 State Rep. 5, 10, 15 N. Y. Supp. 64.

⁹⁴¹ *Standard Trust Co. v. New York Cent. & H. R. R. Co.*, 178 N. Y. 407; *Kitching v. Brown*, 181 N. Y. —.

⁹⁴² *Wilkinson v. Tiffany*, 4 Abb. Pr. 98, 101.

⁹⁴³ *Kraushaar v. Meyer*, 72 N. Y. 602; *Cooper v. Cooper*, 51 App. Div. 595, 64 N. Y. Supp. 901.

ART. VI. TAXATION.

§ 2171. Necessity.

The amount of the costs of an action must be ascertained by taxation before they can be inserted in the judgment.⁹⁴⁴ The remedy, however, where the costs inserted have not been taxed is by motion to correct the judgment. The objection cannot be taken on appeal.⁹⁴⁵ Motion costs need not be taxed where the amounts are apparent from the terms of the order though it is otherwise if the payment of disbursements is ordered.⁹⁴⁶

§ 2172. Who may tax.

The clerk must tax the costs, on the application of the party entitled thereto, except that the court may direct that interlocutory costs or costs in a special proceeding be taxed by a judge.⁹⁴⁷ The taxation of costs, other than those in an interlocutory or special proceeding, by a judge at chambers, is a nullity.⁹⁴⁸

§ 2173. Notice of taxation.

"Costs may be taxed, upon notice to the attorney for each adverse party, who has appeared and is interested in reducing the amount thereof. Notice of taxation must be served, not less than five days before taxation, unless the attorneys, serving and served with the notice, all reside, or have their offices, in the city or town where the costs are to be taxed, in which case,

⁹⁴⁴ Code Civ. Proc. § 3262.

⁹⁴⁵ See post, § 2176.

⁹⁴⁶ See *Ward v. Ward*, 23 Civ. Proc. R. (Browne) 61, 22 N. Y. Supp. 903; *Margulies v. Damrosch*, 23 Misc. 77, 51 N. Y. Supp. 833; *Richardson v. Thedford*, 5 App. Div. 404, 39 N. Y. Supp. 307.

⁹⁴⁷ Code Civ. Proc. § 3262. An order that costs "be regularly taxed," in the absence of a direction that they should be taxed by some other officer, implies taxation by the clerk. *Crosley v. Cobb*, 37 Hun, 271, 9 Civ. Proc. R. (Browne) 322. Costs of a term as a condition of postponement of a cause should be taxed by the clerk and not by the court. *O'Loughlin v. George H. Hammond & Co.*, 12 Civ. Proc. R. (Browne) 170.

⁹⁴⁸ *Lotti v. Krakaner*, 1 Civ. Proc. R. (McCarty) 312, note.

Art. VI. Taxation.—Notice Of.

a notice of two days is sufficient.⁹⁴⁹ It is no objection to a notice that it was given before the right to recover costs was established, provided the right to such costs as were noticed exist at the date for which the notice was given.⁹⁵⁰ Where the costs are not taxed on the day noticed, a new notice is necessary,⁹⁵¹ provided the opposing party appeared on the day first noticed. Otherwise a new notice is not necessary.⁹⁵²

A copy of the bill of costs specifying the items, with the disbursements stated in detail, must be served with the notice.⁹⁵³ And the better practice is to serve the affidavit as to disbursements with the notice of taxation.⁹⁵⁴

— Form of notice.

[Indorse on back of bill of costs.]

Take notice, that the within is a copy of the items of the costs and disbursements in the within action, and that the same will be adjusted by the clerk of the ——— court, at his office, in ———, on the ——— day of ———, 190—, at ——— o'clock, in the forenoon of that day, and the amount inserted in the judgment roll.

[Date.]

_____,
Attorney for ———.

[Address.]

If the attorney for the opposing party swears that he has received no notice, the attorney for the successful party must put in an affidavit definitely stating the time and manner of service.⁹⁵⁵

— **Notice of retaxation.** The costs may also be taxed without any notice being given. But where they are so taxed, notice of retaxation thereof must immediately afterwards be given, as prescribed in section 3263, by the party at whose instance

⁹⁴⁹ Code Civ. Proc. § 3263. Double time if service is by mail. Notice in city court of New York City, see Code Civ. Proc. § 3161, subd. 6.

⁹⁵⁰ Anon., 6 Super. Ct. (4 Sandf.) 693.

⁹⁵¹ Bissell v. Dayton, 2 How. Pr. 80; Morris v. Sliter, 2 How. Pr. 36.

⁹⁵² Cooper v. Astor, 1 Johns. Cas. 22.

⁹⁵³ Code Civ. Proc. § 3263.

⁹⁵⁴ Crosley v. Cobb, 37 Hun. 271.

⁹⁵⁵ Van Wyck v. Reid, 10 How. Pr. 366.

they were taxed, in default whereof the court must, upon the application of a party entitled to notice, direct a retaxation, with costs of the motion, to be paid by the party in default.⁹⁵⁶ So where the first notice was insufficient and did not give the opposing party a fair opportunity to be heard, a retaxation may be ordered on motion.⁹⁵⁷ The motion may, however, be denied because of laches.⁹⁵⁸ A letter from attorneys saying, "we now propose to retax plaintiff's costs in, etc., at, etc.," is not sufficient notice.⁹⁵⁹ The order directing a readjustment should not direct the clerk as to his action on such readjustment, where the parties did not appear together before the clerk on the prior taxation, and submit the facts they wished to present.⁹⁶⁰

§ 2174. Affidavit of disbursements.

An item of disbursements, in a bill of costs, cannot be allowed in any case unless it is verified by affidavit and appears to have been necessarily incurred and to be reasonable in amount.⁹⁶¹ Disbursements can never be taxed without an affidavit that they have been made or incurred.⁹⁶² The affidavit is usually made by the attorney for the moving party.⁹⁶³

— **Witness fees.** Witness fees cannot be allowed without an affidavit,⁹⁶⁴ which must state "the number of days of his

⁹⁵⁶ Code Civ. Proc. § 3264. A readjustment on notice cures the failure to give notice of taxation. *Dix v. Palmer*, 3 Code R. 214, 5 How. Pr. 233; *Henry v. Bow*, 20 How. Pr. 215.

⁹⁵⁷ *Murdock v. Adams*, 10 Hun, 566.

⁹⁵⁸ *Penfield v. James*, 4 Hun, 69 (mem.).

⁹⁵⁹ *Brown v. Ferguson*, 2 How. Pr. 128.

⁹⁶⁰ *Murdock v. Adams*, 10 Hun, 566.

⁹⁶¹ Code Civ. Proc. § 3267. Where the bill of costs presented was verified as to the necessity of the disbursements, but not as to the reasonableness of the items, it was competent for the taxing officer to disallow items as presented, but he had no authority to reduce and allow in accordance with his own view as to the proper charge for printing. *Raff v. Koster*, 27 Misc. 47, 57 N. Y. Supp. 252.

⁹⁶² *O'Loughlin v. George H. Hammond & Co.*, 12 Civ. Proc. R. (Browne) 171.

⁹⁶³ That it need not be made by party or attorney, see *Willink v. Reckle*, 19 Wend. 82.

⁹⁶⁴ Code Civ. Proc. § 3267; *Durant v. Abendroth*, 48 Hun, 16, 1 N. Y. Supp. 538.

actual attendance and, if travel fees are charged, the distance for which they are allowed.⁹⁶⁵ The affidavit must state the name and residence of each witness, the distance they respectively traveled, and the days they actually attended.⁹⁶⁶ It must also aver that the witnesses were material and necessary, or that the party believed them so.⁹⁶⁷ but advice of counsel, as to materiality of witnesses, need not be stated.⁹⁶⁸ If witnesses called were not sworn, the affidavit must show what was expected to be proved by them and why they were not called.⁹⁶⁹ If the witnesses do not attend upon subpoena, then their affidavits that they attended at the request of the party, for the sole purpose of being witnesses, and would not otherwise have come to the place where the court was held, should be produced.⁹⁷⁰ If any witness is subpoenaed at a temporary residence, that fact should be stated.⁹⁷¹ If the witness is a foreign witness, the affidavit must show the distance from the point where persons coming from his place of residence to the court house by the usual route usually enter the state.⁹⁷² So it should be shown that the party claiming the disbursement has paid the fees or become liable therefor.⁹⁷³ The affidavit should be made

⁹⁶⁵ Code Civ. Proc. § 3267.

⁹⁶⁶ *Ehle v. Bingham*, 4 Hill, 595; *Wheeler v. Lozee*, 12 How. Pr. 446. An allowance for fees to witnesses will not be made unless their names are specified in the affidavit of attendance. *La Farge v. Luce*, 1 Wend. 73; *Jones v. Van Ranst*, 2 Super. Ct. (2 Hall) 530. An affidavit showing that the witness who attended resided at a specified distance from the place of trial, etc., is insufficient. It should state the distance traveled by him as a witness. *Schermerhorn v. Van Voast*, 5 How. Pr. 458; *Logan v. Thomas*, 11 How. Pr. 160.

⁹⁶⁷ *Wheeler v. Lozee*, 12 How. Pr. 446. See, as contra, *Wheeler v. Ruckman*, 28 Super. Ct. (5 Rob.) 702. It is not sufficient to merely state that witnesses were necessary. *O'Loughlin v. George H. Hammond & Co.*, 12 Civ. Proc. R. (Browne) 171.

⁹⁶⁸ *Peck v. Powers*, 25 Hun, 65 (mem.).

⁹⁶⁹ *Robitzek v. Hect*, 3 Civ. Proc. R. (Browne) 156; *Kohn v. Manhattan R. Co.*, 8 Misc. 421, 28 N. Y. Supp. 663.

⁹⁷⁰ *Taaks v. Schmidt*, 25 How. Pr. 340.

⁹⁷¹ *Wheeler v. Lozee*, 12 How. Pr. 446.

⁹⁷² *Taaks v. Schmidt*, 25 How. Pr. 340.

⁹⁷³ *Inderlied v. Whaley*, 17 Civ. Proc. R. (Browne) 377, 7 N. Y. Supp. 74; *Lawson v. Hill*, 66 Hun, 288, 20 N. Y. Supp. 904.

Art. VI. Taxation.—Affidavit of Disbursements.

by the party who subpoenaed the witness, or, in case of request, by the party who made the request.⁹⁷⁴

— **Charge for copy of paper.** A charge for a copy of a document or paper cannot be allowed without an affidavit stating that it was actually and necessarily used or was necessarily obtained for use.⁹⁷⁵

— **Fees of referee.** Where opposition is made, on taxation of costs, to the disbursements for the referee's fees, the charge should be supported by affidavit. The general affidavit of disbursements is not sufficient. The affidavit of the referee should show the number of days spent in the business of the referee, and that they were so spent necessarily.⁹⁷⁶

— **Form of affidavit to be subscribed to bill of costs.**

To ———,

Attorney for ———.

[Venue.]

———, being duly sworn, says that he is the attorney for ——— herein. That the foregoing disbursements have been made for services necessarily performed in said action, or which may be necessarily made or incurred therein, on the part of ———. That the cause was necessarily on the calendar the terms above named. That each of the persons named in schedule A, hereto annexed, which is made a part hereof, attended on the trial of said action, pursuant to a subpoena [or "at the special request of this deponent"], as a witness for ———, the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from, the said place of trial; and that each of said persons was a necessary and material witness for ——— on the trial of this action. That the copies of documents or papers as charged herein were actually and necessarily obtained for use.⁹⁷⁷

[Jurat.]

[Signature.]

⁹⁷⁴ Taaks v. Schmidt, 25 How. Pr. 340.

⁹⁷⁵ Code Civ. Proc. § 3267.

⁹⁷⁶ Brown v. Windmuller, 36 Super. Ct. (4 J. & S.) 75; Ward v. James, 8 Hun, 526. Compare Matter of Reeves, 25 State Rep. 457, 6 N. Y. Supp. 450.

⁹⁷⁷ If part of witnesses were not sworn, show why they were not sworn and what was proposed to be proved by them.

Art. VI. Taxation.

SCHEDULE A. WITNESSES.

Witness fees at a trial term commencing the —— day of ——, 190—.

NAMES.	RESIDENCE.	MILES FROM COURT HOUSE.	MILES TRAVELED.	NUMBER OF DAYS ATTENDED.

[Note. This schedule should either be added below the affidavit or inserted in the bill of costs.]

§ 2175. Certificate for costs.

In preceding sections the necessity for a certificate of costs in certain instances has been considered.⁹⁷⁸ Such a certificate is the only competent evidence as to the matter, before the taxing officer, where, upon the trial of an action, the title to real property comes in question, or any fact appears whereby either party becomes entitled to costs, or to the increased costs specified in section 3258 of the Code. In such case the judge presiding at the trial, or the referee, is required, upon the application of the party to be benefited thereby, either before or after the verdict, report, or decision is rendered, to make a certificate, stating the fact.⁹⁷⁹ The certificate is conclusive upon the taxing officer, and is not such an intermediate order as, when specified in the notice of appeal from the judgment, is brought up for review, but if such certificate be improperly granted it may be set aside on motion for that purpose.⁹⁸⁰ The objection that no certificate was obtained cannot be first urged on an appeal from the judgment since a motion should have been made in the trial court to strike the costs from the judgment if the right to costs depends on such a certificate.⁹⁸¹

⁹⁷⁸ See ante, §§ 2085, 2091, 2092, 2100, 2109. Certificate not required where costs are refused because claim sued on was not presented to officer of municipal corporation. *Baine v. Rochester*, 85 N. Y. 523.

⁹⁷⁹ Code Civ. Proc. § 3248.

⁹⁸⁰ *Cooley v. Cummings*, 17 Civ. Proc. R. (Browne) 145, 56 Super. Ct. (24 J. & S.) 521, 4 N. Y. Supp. 530.

⁹⁸¹ *Cunningham v. Hewitt*, 84 App. Div. 114, 118, 81 N. Y. Supp. 1102.

— **Form of certificate.**

[Title of cause.]

I, ———, presiding judge at the trial of the above-entitled action, do hereby certify ———.

[Signature.]

[Date.]

§ 2176. **Procedure.**

The bill of costs with an affidavit of disbursements having been served with the notice of taxation, it is incumbent on the opposing party or parties to attend before the taxing officer on the day fixed to present any objections they may have to the items as included in the bill of costs.

— **Objections to items.** Parties having objections to make must appear before the clerk at the time fixed for the taxation.⁹⁸² But the allowance of an improper item, if not objected to on the taxation, though not ground for retaxation, will nevertheless be deducted, on application for a retaxation.⁹⁸³ So, where the notice of taxation of costs, served on an attorney residing at a distance, though technically regular, is so short that the attorney serving it has reason to believe the other will be unable to attend upon the taxation, the attorney served should not be held concluded by his failure to appear, but the taxation should be reviewed in the same manner as if the attorney had, in fact, appeared and made all proper objections.⁹⁸⁴ Affidavits are admissible in behalf of the opposing party,⁹⁸⁵ or he may make oral objections. The objections must be specific.⁹⁸⁶

— **Powers and duties of taxing officer.** “An officer, authorized to tax costs in an action or a special proceeding, must, whether the taxation is opposed, or not, examine the bills presented to him for taxation, must satisfy himself that all the items allowed by him are correct and legal, and must strike out all charges for fees, other than the prospective charges expressly allowed by law, where it does not appear that the services,

⁹⁸² *Hinckley v. Boardman*, 3 Caines, 134.

⁹⁸³ *Pentz v. Hawley*, 2 Barb. Ch. 552.

⁹⁸⁴ *Goodyear v. Baird*, 11 How. Pr. 377; *Lotti v. Krakaner*, 1 Civ. Proc. R. (McCarty) 312, note.

⁹⁸⁵ *Crosley v. Cobb*, 37 Hun, 271.

⁹⁸⁶ *People v. Lewis*, 28 How. Pr. 159, 161.

for which they are charged, were necessarily performed.⁹⁸⁷ The clerk should reject a charge if he has doubts as to its correctness, whether or not the item is objected to.⁹⁸⁸ Inasmuch as his duties are ministerial, he must obey the orders and directions of the court.⁹⁸⁹ Thus, the clerk should refuse to tax the costs where the court has dismissed an action without costs.⁹⁹⁰ The propriety of the allowance of any costs whatever cannot be considered.⁹⁹¹ The Code provides that in a case where the costs are in the discretion of the court, the report or decision, or the direction of the court for final judgment, upon a default, or after a jury trial, must specify which party or parties are entitled to costs; but the amount of the costs must be ascertained by taxation.⁹⁹² So the clerk cannot refuse to tax costs, on entering judgment on a referee's report, on the ground that it was not regularly obtained, since such question is to be passed on by the court.⁹⁹³ Where several defendants claim separate bills of costs, the clerk cannot refuse to tax separate bills since the right thereto is a question for the court.⁹⁹⁴ But, in such a case, the costs of all must be taxed at the same time.⁹⁹⁵ The duties of the clerk in taxing an additional allowance have already

⁹⁸⁷ Code Civ. Proc. § 3266; *Delcomyn v. Chamberlain*, 48 How. Pr. 409.

⁹⁸⁸ *Rogers v. Rogers*, 2 Paige, 458.

⁹⁸⁹ *Schum v. Rochester*, 16 Civ. Proc. R. (Browne) 218, 3 N. Y. Supp. 512; *Hite v. Chittenden*, 1 N. Y. Leg. Obs. 360. Where an order confirming a referee's report in favor of defendants directs "that the defendant have judgment for costs and disbursements of this action against the plaintiff," it is not error for the clerk to tax costs as in an action, as the order is his guide; if costs should have been taxed as in a special proceeding, the remedy is by appeal from the order, and not by motion to set aside the taxation. *Hearn v. Sullivan*, 13 Abb. N. C. 371.

⁹⁹⁰ *Olcott v. Maclean*, 11 Hun, 394.

⁹⁹¹ *Wehle v. Bowery Sav. Bank*, 40 Super. Ct. (8 J. & S.) 161; *Train v. Davidson*, 11 App. Div. 627, 42 N. Y. Supp. 1133; *Manhattan R. Co. v. Youmans*, 81 Hun, 82, 30 N. Y. Supp. 566.

⁹⁹² Code Civ. Proc. § 3262.

⁹⁹³ *Ballou v. Parsons*, 67 Barb. 19, 52 How. Pr. 164.

⁹⁹⁴ *Williams v. Cassady*, 22 Hun. 180. Compare, as contra, *Haye v. Robertson*, 38 Super. Ct. (6 J. & S.) 59.

⁹⁹⁵ *Tenbroeck v. Paige*, 6 Hill, 267.

been considered.⁹⁹⁶ The affidavits used should be marked, and the objections properly noted by the clerk, so that his adjudication may be reviewed in case of an appeal from his taxation.⁹⁹⁷ If the clerk refuses to tax the costs, a motion may be made at special term to compel him to do so.⁹⁹⁸

The power of the clerk to tax costs is exhausted upon the first application, and if the papers thereupon are defective, he cannot entertain a second application to tax the costs without a special order of the court, which order should be granted upon notice.⁹⁹⁹ So where judgment is entered by the attorney of some of defendants in favor of them all but with costs taxed in favor of all the defendants, the remedy of another defendant not represented by such attorney, who objects to the taxation of costs, is to have the judgment corrected and then to tax his costs and enter a proper judgment, and an order for an additional taxation is improper.¹⁰⁰⁰

—**Inserting costs in judgment.** The clerk must insert, in the judgment or final order, the amount of the costs, as taxed,¹⁰⁰¹ provided the right to costs exists by statute or is given by verdict, decision, or report.¹⁰⁰² The clerk may enter judgments with blanks for the costs, and insert them afterwards when they have been taxed.¹⁰⁰³ If costs are inserted in the judgment without taxation, the remedy is by motion to correct the judgment.¹⁰⁰⁴

§ 2177. Retaxation and review of taxation.

Error in adjusting the costs is not ground for setting aside

⁹⁹⁶ See ante, § 2170.

⁹⁹⁷ *Lotti v. Krakauer*, 1 Civ. Proc. R. (McCarty) 312, note.

⁹⁹⁸ *Clafin v. Davidson*, 53 Super. Ct. (21 J. & S.) 122.

⁹⁹⁹ *Larkin v. Steele*, 25 Hun, 254; *Talcott v. Wabash R. Co.*, 90 N. Y. Supp. 1037.

¹⁰⁰⁰ *Hauselt v. Bonner*, 25 State Rep. 36, 6 N. Y. Supp. 282.

¹⁰⁰¹ Code Civ. Proc. § 3262. See, also, Id. § 1231.

¹⁰⁰² *Bailey v. Stone*, 41 How. Pr. 346, 348.

¹⁰⁰³ *Cotes v. Smith*, 29 How. Pr. 326.

¹⁰⁰⁴ *Hecla Consol. Gold Min. Co. v. O'Neill*, 67 Hun. 67, 51 State Rep. 436, 23 Civ. Proc. R. (Browne) 143, 22 N. Y. Supp. 130.

the judgment.¹⁰⁰⁵ So a party cannot withdraw a bill and notice it for taxation before another taxing officer because dissatisfied with the first officer's decision as to some of the items.¹⁰⁰⁶ The remedy of the party dissatisfied is to apply to the court at special term for a retaxation. This motion may be made pursuant either to section 3264 or section 3265 of the Code.

Section 3264 provides that the court may, in its discretion, on the application of a party interested, direct a retaxation of costs at any time.¹⁰⁰⁷ Any "party interested" may apply. Thus a junior attaching creditor may apply for a readjustment of costs in a former attachment suit.¹⁰⁰⁸ So the costs upon a recovery in ejectment by the lessor against a tenant under a perpetual lease after default in payment of rent may be re-taxed upon the application of a mortgagee of the leasehold who seeks to redeem upon payment of back rent and costs.¹⁰⁰⁹ Under this section the court may order retaxation of costs at any time although no appeal was taken from the taxation by the clerk, disallowing the items claimed.¹⁰¹⁰ But plaintiff's inadvertence in omitting to claim as great an allowance as he might be entitled to is not ground for asking retaxation.¹⁰¹¹

Section 3265 of the Code provides that "a taxation or retaxation may be reviewed by the court, on a motion for a new taxation." This motion is in the nature of an appeal from the taxation by the taxing officer.¹⁰¹² The court, at special term, acts as an appellate tribunal.

In case more than one bill of costs is taxed where there are several defendants, the party charged therewith may move at special term for a retaxation and that one bill be stricken out.¹⁰¹³

¹⁰⁰⁵ *Toll v. Thomas*, 15 How. Pr. 315; *Watson v. Gardiner*, 50 N. Y. 671.

¹⁰⁰⁶ *Hall v. Sherwood*, 2 Wend. 252.

¹⁰⁰⁷ Code Civ. Proc. § 3264.

¹⁰⁰⁸ *Goodman v. Guthman*, 2 Wkly. Dig. 338.

¹⁰⁰⁹ *Keeler v. Keeler*, 102 N. Y. 30.

¹⁰¹⁰ *Cohn v. Husson*, 13 Daly, 334.

¹⁰¹¹ *Matthews v. Matson*, 3 Civ. Proc. R. (Browne) 157.

¹⁰¹² *Andrews v. Cross*, 17 Abb. N. C. 92.

¹⁰¹³ *Delaware, L. & W. R. Co. v. Burkard*, 40 Hun. 625, which re-

If the costs as taxed are deemed fraudulent and excessive the remedy is not by an action but by a motion.¹⁰¹⁴

— **Time for motion.** The motion should be made promptly after the taxation as the motion may be denied for laches.¹⁰¹⁵ The motion must be made not only before the costs, as taxed, are paid,¹⁰¹⁶ but also before a judgment containing the costs is entered by the moving party.¹⁰¹⁷ The fact that the moving party perfects an appeal does not waive his right to move,¹⁰¹⁸ especially where the appeal is taken at a time when the appellant supposed the clerk was holding the matter of taxation of costs under advisement.¹⁰¹⁹

— **Motion papers and scope of review.** Inasmuch as the proceeding is in the nature of an appeal, only the papers used before the clerk can be considered.¹⁰²⁰ It follows that new objections cannot be first urged on the motion to retax.¹⁰²¹ The use of other papers is improper except in so far as necessary to show the clerk's action.¹⁰²² Thus when the objections to the items of the bill are made orally, before the taxing officer, the adverse party, upon an application for retaxation, should state, in an affidavit, what took place on the taxation, and serve a copy of the affidavit upon the adverse party, with notice of

views the cases. See, also, *Wolf v. Di Lorenzo*, 22 Misc. 323, 326, 49 N. Y. Supp. 191.

¹⁰¹⁴ *New York City v. Cornell*, 9 Hun, 215.

¹⁰¹⁵ *Guckenheimer v. Angevine*, 16 Hun, 453; *Penfield v. James*, 4 Hun, 69.

¹⁰¹⁶ *Collomb v. Caldwell*, 5 How. Pr. 336, 1 Code R. (N. S.) 41; *Schermerhorn v. Van Voast*, 5 How. Pr. 458.

¹⁰¹⁷ *Burrows v. Butler*, 38 Hun, 121.

¹⁰¹⁸ *McDermott v. Yvelin*, 103 App. Div. 418, 92 N. Y. Supp. 1088; overruling *Guckenheimer v. Angevine*, 16 Hun, 453; *Sleeman v. Hotchkiss*, 45 State Rep. 749, 18 N. Y. Supp. 533.

¹⁰¹⁹ *Le Rory v. Browne*, 54 Hun, 584, 18 Civ. Proc. R. (Browne) 125, 8 N. Y. Supp. 82.

¹⁰²⁰ *Remington Paper Co. v. O'Brien*, 18 Wkly. Dig. 209; *Varnum v. Wheeler*, 9 Civ. Proc. R. (Browne) 421; *Evans v. Silbermann*, 7 App. Div. 139, 40 N. Y. Supp. 298.

¹⁰²¹ *Cuyler v. Coats*, 10 How. Pr. 141.

¹⁰²² *Lyman v. Young Men's Cosmopolitan Club*, 38 App. Div. 220, 56 N. Y. Supp. 712; *People v. Oakes*, 1 How. Pr. 195.

the motion for retaxation.¹⁰²³ The affidavit in support of the appeal should show that the allowance of such items as are objected to was opposed before the clerk and that they were allowed under objection.¹⁰²⁴ An affidavit for retaxation, as to items not provided for in the fee bill, need only show they were objected to before the taxing officer. As to other items, it should state the grounds of objection.¹⁰²⁵ The bill of costs should be before the court, with the items objected to, and the exceptions to the rulings of the clerk.¹⁰²⁶ The moving party need not serve copies of the papers used before the clerk, but where there is a dispute as to what papers were so used, the moving party should obtain and present a certificate of the clerk showing fully what papers or records were used, and should then produce in court the original papers or certified copies thereof.¹⁰²⁷ Where, however, on retaxation, the court believes the taxation erroneous, they can refer to a new affidavit for the purpose of ascertaining whether there were any new facts by reason of which a readjustment should properly be ordered before the clerk instead of correcting the errors themselves.¹⁰²⁸

The question as to the right to costs cannot be reviewed since the remedy is by appeal from the judgment.¹⁰²⁹

—**Order.** The order, made upon a motion for a new taxation, may allow or disallow any item, objected to before the taxing officer, in which case, it has the effect of a new taxation; or it may direct a new taxation before the proper officer, specifying the grounds or the proof, upon which the item may be

¹⁰²³ Webb v. Crosby, 11 Paige, 193.

¹⁰²⁴ Lotti v. Krakauer, 1 City Ct. R. 60, 1 Civ. Proc. R. (McCarty) 312, note. On an appeal from taxation, the appellant must show, by affidavit, that it was opposed, and the items objected to were taxed under objection. To state in the notice of motion the items, and grounds of objection, will not suffice. People v. Oakes, 1 How. Pr. 195.

¹⁰²⁵ Wilder v. Wheeler, 1 How. Pr. 136.

¹⁰²⁶ Comly v. New York City, 1 Civ. Proc. R. (McCarty) 306.

¹⁰²⁷ Ferguson v. Wooley, 9 Civ. Proc. R. (Browne) 236.

¹⁰²⁸ Shultz v. Whitney, 9 Abb. Pr. 71, 17 How. Pr. 471.

¹⁰²⁹ Schum v. Rochester, 16 Civ. Proc. R. (Browne) 218, 3 N. Y. Supp. 512. But see, as contra, Taylor v. Wright, 22 Misc. 368, 50 N. Y. Supp. 305.

allowed or disallowed by him.¹⁰³⁰ When the objection presents a question of law, the special term should allow or disallow the item instead of ordering a new taxation before the clerk. When the objection presents a question of fact, the special term may determine it, and allow or disallow the item, or it may direct a new taxation before the clerk, specifying the grounds or the proof upon which the item may be allowed or disallowed.¹⁰³¹ Where a taxation of costs in favor of plaintiff is set aside by the special term, the court should not adjust the costs but should send the matter back to the clerk with a direction to retax on notice, where defendants have not been heard before the taxing officer on the items of the bill.¹⁰³² Where the only papers before the court are the bill of costs and the affidavit of the necessity of the disbursements, without any facts challenging the verity of the affidavit or showing that the disbursement was not necessary, the court cannot strike out a disbursement which may have been necessary.¹⁰³³ When both parties appear, the court may not only set aside the taxation but vacate the judgment entered for the costs, although this relief be not asked for in the notice of motion, as it is incidental to the vacating of the taxation.¹⁰³⁴ The allowance of a small disbursement which was technically unnecessary but incurred in good faith will not be interfered with.¹⁰³⁵ Where an item objected to is disallowed because of the insufficiency of the affidavit in support thereof, leave to supply the defects in the affidavit will not be granted unless an excuse is shown for the failure to present the necessary proof on the first taxation.¹⁰³⁶ The party applying for a retaxation should be charged with costs if he does not succeed in obtaining a retaxation as to any of the items objected to before the taxing officer.¹⁰³⁷ If the moving party succeeds only as to a part of the items as to

¹⁰³⁰ Code Civ. Proc. § 3265.

¹⁰³¹ *Crosley v. Cobb*, 37 Hun, 271.

¹⁰³² *Adolph v. De Cen*, 13 Civ. Proc. R. (Browne) 5.

¹⁰³³ *Cutter v. Morris*, 7 State Rep. 426, 26 Wkly. Dig. 254.

¹⁰³⁴ *Jones v. Cook*, 11 Hun, 230.

¹⁰³⁵ *People v. Colborne*, 20 How. Pr. 378.

¹⁰³⁶ *Ball v. Sprague*, 23 How. Pr. 241.

¹⁰³⁷ *Pentz v. Hawley*, 2 Barb. Ch. 552.

which he sought a retaxation, neither party should be awarded costs.¹⁰³⁸ The order is appealable.¹⁰³⁹

— **Effect on judgment of retaxation.** A retaxation of costs does not affect the judgment for costs taxed without notice, and it cannot be modified by deducting the sums disallowed, but they are to be credited on the execution when issued.¹⁰⁴⁰ The Code provides that “any sum, deducted on a retaxation, must be credited upon the execution, or other mandate issued to enforce the judgment.”¹⁰⁴¹ It follows that the service of a copy of the judgment and notice of its entry before readjustment of costs is effectual to limit the defendant’s time to appeal, though the costs are afterwards readjusted.¹⁰⁴²

— **Procedure on new taxation.** On a new taxation before the clerk, the parties retry the questions of fact without being confined to the evidence first presented.¹⁰⁴³

§ 2178. Collateral attack.

The taxation of costs is a judicial proceeding which cannot be impeached collaterally if the taxing officer had jurisdiction.¹⁰⁴⁴

ART. VII. COLLECTION.

§ 2179. General considerations.

As stated in a preceding chapter, there is ordinarily only one judgment to be entered in an action, and if money damages are recovered, the costs become merged in the judgment and are collectible as a part thereof. A discharge in bankruptcy discharges the costs.¹⁰⁴⁵

§ 2180. Execution against property.

A judgment for damages and costs is an entirety so that the costs may be collected by an execution against property, as a part of the judgment.

¹⁰³⁸ *Otis v. Forman*, 1 Barb. Ch. 39, 32.

¹⁰³⁹ *Sluyter v. Smith*, 15 Super. Ct. (2 Bosw.) 673, 678.

¹⁰⁴⁰ *Hewitt v. City Mills*, 136 N. Y. 211; *Baker v. Coddington*, 3 Misc. 512, 52 State Rep. 416, 23 N. Y. Supp. 5.

¹⁰⁴¹ Code Civ. Proc. § 3264.

¹⁰⁴² *Hewitt v. City Mills*, 136 N. Y. 211.

¹⁰⁴³ *Crosley v. Cobb*, 37 Hun, 271.

¹⁰⁴⁴ *Brady v. City of New York*, 3 Super. Ct. (1 Sandf.) 569, 582.

¹⁰⁴⁵ *Clark v. Rowling*, 3 N. Y. (3 Comst.) 216.

— **Motion costs.** Where costs of a motion directed to be paid are not paid within the time fixed for that purpose by the order, or, if no time is fixed, within ten days after a service of a copy of the order, an execution against the personal property only of the party required to pay them may be issued by any party or person to whom the said costs is made payable by said order, or in case permission of the court shall first be obtained, by any party or person having an interest in compelling payment thereof, which execution shall be in the same form, as nearly as may be, as an execution on a judgment, omitting the recitals and directions relating to real property.¹⁰⁴⁶ This Code provision does not apply to interlocutory costs, on a demurrer, awarded as prescribed in section 3232 of the Code, where other issues remain to be tried.¹⁰⁴⁷ Costs of an appeal are costs of a motion within this Code section,¹⁰⁴⁸ but costs of an application for judgment on the pleadings are not costs of a motion,¹⁰⁴⁹ nor are costs of a motion in a special proceeding such as supplementary proceedings.¹⁰⁵⁰ If the order is served by mail, twenty days are allowed.¹⁰⁵¹

§ 2181. Execution against person.

A person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment or by a final order made in a special proceeding instituted by state writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for nonattendance.¹⁰⁵²

¹⁰⁴⁶ Code Civ. Proc. § 779. Form of execution on judgment, see post, §§ 2217-2226. Stay of proceedings until payment of motion costs, see vol. 2, p. 1915.

¹⁰⁴⁷ Cassavoy v. Pattison, 101 App. Div. 128, construing Code Civ. Proc. § 3233.

¹⁰⁴⁸ McIntyre v. German Sav. Bank, 59 Hun, 536, 13 N. Y. Supp. 674.

¹⁰⁴⁹ Wesley v. Bennett, 6 Abb. Pr. 12.

¹⁰⁵⁰ Valiente v. Bryan, 65 How. Pr. 203.

¹⁰⁵¹ Wellman v. Frost, 38 Hun, 389.

¹⁰⁵² Code Civ. Proc. § 15. What constitutes misconduct of attorney, see Mack v. Cohn, 15 Wkly. Dig. 136; Matter of Kelly, 62 N. Y. 198.

If the action is one in which plaintiff is entitled to a body execution, he may issue it to recover the costs included in the judgment in the action though the judgment does not award any damages.¹⁰⁵³ So defendant may collect his judgment for costs by a body execution if the action is one in which plaintiff would have been entitled to one to enforce his judgment had he been successful.¹⁰⁵⁴ And a body execution may be issued against plaintiff though he is defeated on a technicality.¹⁰⁵⁵ So if plaintiff's recovery is not sufficient in amount to carry costs and the costs which defendant is entitled to exceed the amount of plaintiff's recovery, the balance may be collected by a body execution against plaintiff, if the action is one in which such an execution may issue.¹⁰⁵⁶

§ 2182. Supplementary proceedings.

Supplementary proceedings may be maintained on a judgment for costs only if the judgment is for twenty-five dollars or more.¹⁰⁵⁷

§ 2183. Contempt proceedings.

If an execution cannot issue to collect the costs, contempt proceedings are proper. Section 2268 of the Code which provides for the punishment by contempt proceedings of one who neglects or refuses to obey an order of court requiring the payment of costs is qualified by the further Code provision that contempt proceedings are proper only where an execution cannot be awarded for the collection of the sum.¹⁰⁵⁸ Motion costs cannot ordinarily be enforced by contempt proceedings.¹⁰⁵⁹ But where the costs are a mere incident to the matter before

¹⁰⁵³ *Smith v. Duffy*, 37 Hun, 506; followed in *Finkemauro v. Dempsey*, 8 Civ. Proc. R. (Browne) 418.

¹⁰⁵⁴ *Saffier v. Haft*, 86 App. Div. 284, 83 N. Y. Supp. 763; *Kloppenberger v. Neefus*, 6 Super. Ct. (4 Sandf.) 655; *Parker v. Spear*, 16 Wkly. Dig. 417, 49 Super. Ct. (17 J. & S.) 1.

¹⁰⁵⁵ *Parker v. Spear*, 62 How. Pr. 394.

¹⁰⁵⁶ *Philbrook v. Kellogg*, 21 Hun, 238.

¹⁰⁵⁷ *Davis v. Herrig*, 65 How. Pr. 290; *Matter of Sirrett*, 25 Misc. 89, 54 N. Y. Supp. 666.

¹⁰⁵⁸ *Matter of Hess*, 48 Hun, 586, 1 N. Y. Supp. 811.

¹⁰⁵⁹ *Forstman v. Schulting*, 4 State Rep. 463.

the court and are simply a part of the sum ordered or adjudged by the court to be paid, the failure to pay such costs may be punished by contempt proceedings although they might have been collected by execution.¹⁰⁶⁰ Costs awarded in a judgment in an action for a divorce cannot be collected by contempt proceedings,¹⁰⁶¹ but alimony and counsel fees may be collected by such proceedings.¹⁰⁶² The provisions of section 2007 of the Code authorizing the court to enforce by contempt proceedings payment of costs awarded in special proceedings instituted by state writ are permissive only and confer upon the court a discretionary power which the successful party in such a litigation may properly invoke, but which the court is at liberty to exercise or not, according to the facts of the case, and particularly with reference to the ability of the defeated party to pay costs awarded against him.¹⁰⁶³ It has already been noticed that where a third person not a party has been adjudged liable for the costs, the collection thereof may be enforced against him by contempt proceedings.¹⁰⁶⁴

§ 2184. **Mandamus.**

If costs have been awarded against a municipality, mandamus lies to compel the municipality to provide for the payment thereof.¹⁰⁶⁵

§ 2185. **Stay of proceedings.**

The stay of proceedings until the costs of a motion¹⁰⁶⁶ or of a

¹⁰⁶⁰ *Holton v. Robinson*, 59 App. Div. 45, 51, 69 N. Y. Supp. 33.

¹⁰⁶¹ *Weill v. Weill*, 18 Civ. Proc. R. (Browne) 241, 10 N. Y. Supp. 627; *Jacquin v. Jacquin*, 36 Hun, 378. Contra, *Cockefair v. Cockefair*, 23 Abb. N. C. 219, 7 N. Y. Supp. 170.

¹⁰⁶² *Flor v. Flor*, 73 App. Div. 262, 76 N. Y. Supp. 813; *Mercer v. Mercer*, 73 Hun, 192, 25 N. Y. Supp. 867.

¹⁰⁶³ *People v. Masonic Guild & Mut. Ben. Ass'n*, 22 Civ. Proc. R. (Browne) 74, 18 N. Y. Supp. 806.

¹⁰⁶⁴ See ante, § 2106, p. 2948.

¹⁰⁶⁵ *People v. Board of Education*, 26 App. Div. 208, 49 N. Y. Supp. 915; *People v. Fulton County Sup'rs*, 70 Hun, 560, 24 N. Y. Supp. 397.

¹⁰⁶⁶ Volume 2, p. 1915.

former action between the same parties¹⁰⁶⁷ are paid has been considered in a preceding volume.

§ 2186. Payment of costs awarded against the state.

Where costs are awarded against the people of the state, in an action or a special proceeding brought, by a public officer, pursuant to any provision of law, and the proceedings have not been stayed by appeal or otherwise, the comptroller must draw his warrant upon the treasurer, for the payment of the costs, out of any money in the treasury, appropriated for that purpose, upon the production to him of an exemplified copy of the judgment or order awarding the costs, and, where the amount is not fixed thereby, of a taxed bill of costs, accompanied, in either case, with a certificate of the attorney-general, to the effect that the action or special proceeding was brought pursuant to law. The fees of the clerk for the exemplified copy must be certified thereupon by him, and included in the warrant.¹⁰⁶⁸

§ 2187. Collection of costs against a corporation.

Where final judgment in an action in behalf of the people, as authorized in title one of chapter sixteen of the Code, is rendered against a corporation, or persons claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation, or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.¹⁰⁶⁹

§ 2188. Set off of costs.

If one party recovers judgment and the other party is entitled to costs, the smaller sum is deducted from the larger and judgment entered for the balance.¹⁰⁷⁰ So where both plaintiff

¹⁰⁶⁷ Volume 2, pp. 1912-1915.

¹⁰⁶⁸ Code Civ. Proc. § 3241.

¹⁰⁶⁹ Code Civ. Proc. § 1987.

¹⁰⁷⁰ Johnson v. Farrell, 10 Abb. Pr. 384; Bulkley v. Back, 54 Super

and defendant are entitled to a bill of costs, defendant's may be set off against plaintiff's.¹⁰⁷¹ And judgments for costs in different suits, between the same parties, may be set off on motion.¹⁰⁷²

The Code provides that where motion costs have not been collected when final judgment is entered, they may be set off against costs awarded to the adverse party.¹⁰⁷³ Costs on a reference ordered under section 1015 are motion costs which may be set off pursuant to this provision.¹⁰⁷⁴ Motion costs cannot, however, be set off against a judgment while an appeal is pending therefrom.¹⁰⁷⁵ And a defendant, who, upon determination of a demurrer in his favor, has been awarded costs to abide the event, is not entitled, upon the plaintiff's succeeding in the action, to offset such costs against those recovered by the plaintiff.¹⁰⁷⁶ It has been held that the motion for a set-off can only be made by the party entitled to receive such costs.¹⁰⁷⁷ Costs awarded a defendant in divorce on an appeal to the court of appeals in an interlocutory application cannot, upon motion of the plaintiff, be offset against arrears of alimony awarded against the defendant.¹⁰⁷⁸ Where costs of a motion have been assigned by the party to whom they were awarded, they cannot be offset on motion against the costs allowed by an order setting aside a precept for their collection.¹⁰⁷⁹

Ct. (22 J. & S.) 300; *Coatsworth v. Ray*, 28 Civ. Proc. R. (Kerr) 6, 52 N. Y. Supp. 498.

¹⁰⁷¹ *Hudson v. Guttenberg*, 9 Abb. N. C. 415.

¹⁰⁷² *Wheeler v. Heermans*, 3 Sandf. Ch. 597; *Stuyvesant v. Davies*, 3 Edw. Ch. (N. Y.) 537; *Fitch v. Baldwin*, Clarke Ch. 426. Costs must, however, be liquidated. *Ainslie v. Boynton*, 2 Barb. 258.

¹⁰⁷³ Code Civ. Proc. § 779.

¹⁰⁷⁴ *Jones v. Easton*, 11 Abb. N. C. 114.

¹⁰⁷⁵ *Hardt v. Schulting*, 24 Hun, 345.

¹⁰⁷⁶ The condition of the award to defendant is not fulfilled in such case, and Code Civ. Proc. § 779, has no application. *Murphy v. Gold & Stock Tel. Co.*, 18 Civ. Proc. R. (Browne) 43, 27 State Rep. 30, 9 N. Y. Supp. 28.

¹⁰⁷⁷ *Tunstall v. Winton*, 18 Wkly. Dig. 205.

¹⁰⁷⁸ *Winton v. Winton*, 18 Civ. Proc. R. (Browne) 67, 13 N. Y. Supp. 759.

¹⁰⁷⁹ *Wellman v. Frost*, 38 Hun, 389.

The cases are in conflict as to whether a set-off of costs will be allowed where it will interfere with the attorney's lien thereon.¹⁰⁸⁰ Even if, as the later decisions hold, the party has title to the costs,¹⁰⁸¹ while the attorney merely has a lien thereon,¹⁰⁸² it would seem that such lien should be protected against a set-off unless there are special reasons why the attorney's lien should be subordinated to the right of set-off. Of course if the costs belong to the attorney, they cannot be set-off as between the parties.¹⁰⁸³

§ 2189. Recovery back of costs paid.

While the general rule is that moneys voluntarily paid cannot be recovered back though the party paying them is not liable therefor, yet costs paid may be recovered back on the reversal of the order or judgment by which they are awarded.¹⁰⁸⁴ So costs paid in ignorance of the death of the plaintiff, before a referee's report and entry of judgment thereon, may be recovered.¹⁰⁸⁵

¹⁰⁸⁰ See vol. 1, p. 303.

¹⁰⁸¹ See ante, § 2081, and vol. 1, p. 303.

¹⁰⁸² See ante, § 2081.

¹⁰⁸³ *Gibbs v. Prindle*, 11 App. Div. 470, 42 N. Y. Supp. 329.

¹⁰⁸⁴ *Armstrong v. Cummings*, 17 Wkly. Dig. 165; *Rozelle v. Andrews*, 6 State Rep. 730. Costs for proceedings before trial, including those after notice, and term fees, are not lost by the reversal of the judgment awarding them, if the party obtaining reversal is finally liable to costs, whether nominally successful or not. *Isaacs v. New York Plaster Works*, 4 Abb. N. C. 4, 40 Super. Ct. (8 J. & S.) 277; *Donovan v. Board of Education*, 1 Civ. Proc. R. (McCarty) 311, 312, note.

¹⁰⁸⁵ *Arents v. Long Island R. Co.*, 36 App. Div. 379, 55 N. Y. Supp. 401. Compare *Lachenmeyer v. Lachenmeyer*, 65 How. Pr. 422.

CHAPTER II.

FEES.

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§ 2190. Scope of chapter.

To insert in this chapter all the Code provisions relating to fees would be a waste of space inasmuch as many of such provisions are lengthy and practically all of them are so clear in their terms that the courts have not been called on to construe their meaning. This chapter will therefore be confined to a few general rules and a consideration of the question of the fees of a referee.

§ 2191. Code provisions.

Sections 3280 to 3333 govern the fees of officers rendered in an action. They do not apply, however, to fees for services rendered in a special proceeding,¹ nor to a case where special provision is otherwise made by statute for compensation for a particular service.²

§ 2192. General rules.

Clerks of court and other officers must perform the duties

¹ Code Civ. Proc. § 3332.

² Code Civ. Proc. § 3330.

imposed on them by law without other, or greater, fees or rewards than those expressly allowed by law. They cannot demand or receive any fee or compensation unless the service was actually rendered; except that an officer may demand in advance his fee, where he is, by law, expressly directed or permitted to require payment thereof, before rendering the service. For violation of these rules, an officer or other person is liable, in addition to the punishment prescribed by law for the criminal offense, to an action in behalf of the person aggrieved, in which the plaintiff is entitled to treble damages.³

§ 2193. Fees of referee.

A referee, in an action or a special proceeding, brought in a court of record, or in supplementary proceedings, is entitled to ten dollars for each day spent in the business of the reference; unless, at or before the commencement of the trial or hearing, a different rate of compensation is fixed, by the consent of the parties, other than those in default for failure to appear or plead, manifested by an entry in the minutes of the referee or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him.⁴ The fact that the hearings are protracted to unusual hours does not entitle the referee to more than the ten dollars per diem.⁵ This section applies to a reference on default to ascertain the amount of plaintiff's damages,⁶ or a reference to take and state an account,⁷ but not to a reference in connection with a physical examination of a party before trial.⁸ The right of a referee to compensation is not affected by the fact that on appeal the judgment entered pursuant to his report is reversed.⁹

³ Code Civ. Proc. §§ 3280-3282.

⁴ Code Civ. Proc. § 3296.

⁵ Matter of Bieber, 36 Misc. 341, 73 N. Y. Supp. 552.

⁶ *Bowe v. Brown*, 4 State Rep. 456.

⁷ *Kepler v. Merkle*, 9 Civ. Proc. R. (Browne) 284.

⁸ *Reichel v. New York Cent. & H. R. R. Co.*, 18 Civ. Proc. R. (Browne) 256, 9 N. Y. Supp. 415.

⁹ *Russell v. Lyth*, 66 App. Div. 290, 72 N. Y. Supp. 615.

The fees of a referee to sell real property will be considered in a subsequent chapter.^{9a}

— **Agreement for more than statutory rate.** The agreement for increased fees may be evidenced either by a written stipulation or by an entry in the referee's minutes entered pursuant to a verbal agreement made at the commencement of the trial.¹⁰ A stipulation that the referee "may charge such fees therefor as he deems proper" is invalid.¹¹ A per diem stipulation applies to time spent in the investigation and consideration of the case after submission;¹² but a stipulation for a specified sum per day "for every hearing" does not apply to days when the hearing was postponed by prior agreement of which the referee had notice.¹³ A receiver cannot stipulate for an increase of the per diem fees unless by leave of court.¹⁴

— **Two actions tried on same day or tried together.** A referee who hears and decides several cases on the same day can charge fees only in one case.¹⁵ But if two separate actions, brought in different courts, are tried together, the referee is entitled to his full fees in each case in the absence of any stipulation.¹⁶

— **For what time allowed.** The referee is allowed ten dollars for each day spent "in the business of the reference," i. e., "necessarily" spent in the business of the reference¹⁷ which

^{9a} See post, § 2265.

¹⁰ *Duhrkop v. White*, 13 App. Div. 293, 43 N. Y. Supp. 190; *Griggs v. Day*, 135 N. Y. 469.

¹¹ *Mark v. Buffalo*, 87 N. Y. 184; *Griggs v. Day*, 135 N. Y. 469; *Brown v. Sears*, 23 Misc. 559, 52 N. Y. Supp. 792. See, also, *Dickinson v. Earle*, 63 App. Div. 140, 71 N. Y. Supp. 231.

¹² *Herschell v. Rogers*, 2 Month. Law Bul. 14.

¹³ *Mead v. Tuckerman*, 105 N. Y. 557.

¹⁴ *People v. Continental L. Ins. Co.*, 15 Wkly. Dig. 569.

¹⁵ *Dissosway v. Winant*, 33 How. Pr. 460; *People v. Continental L. Ins. Co.*, 15 Wkly. Dig. 569.

¹⁶ *Holmes & G. Mfg. Co. v. Morse*, 28 Abb. N. C. 133, 19 N. Y. Supp. 190. Compare *Brown v. Sears*, 23 Misc. 559, 52 N. Y. Supp. 792; *Byrne v. Groot*, 5 Month. Law Bul. 56.

¹⁷ *Finkel v. Kohn*, 24 Misc. 368, 53 N. Y. Supp. 694; *Matter of Piatti*, 26 Misc. 434, 56 N. Y. Supp. 132.

includes the time occupied in preparing his report.¹⁸ This includes a day when there was an adjournment where the referee attended,¹⁹ but not where he did not attend because of notice that the parties had consented to a postponement.²⁰ No charge is allowable for examining testimony and exhibits in addition to compensation for general study of the case.²¹ The mere filing of a paper with a referee is not a hearing.²² A term fee of ten dollars is not allowed for each time that a cause is noticed for hearing before a referee.²³

— **Lien and enforcement.** The referee may retain his report until his fees are paid. He has a lien on it which is not divested until there is a complete delivery to the attorney of one of the parties, i. e., a delivery to an attorney merely for the purpose of allowing him to read it does not defeat the lien.²⁴ If the referee loses his lien by delivery, he can recover his fees only by a common-law action.²⁵ The Code regulates the compensation of referees as disbursements among the litigants but there is no limitation on their common-law liability to pay him for labor rendered at their instance.²⁶ The court has no power to order a party to pay the referee's fees and take up the report,²⁷ nor to enforce the payment by punishment for contempt.²⁸ But while the referee may insist that he be paid his fees before delivery of the report, yet he must remit the excess if they are greater than the amount ultimately allowed as

¹⁸ *Nealis v. Meyer*, 21 Misc. 344, 47 N. Y. Supp. 156.

¹⁹ *Jones v. Newton*, 33 State Rep. 823, 11 N. Y. Supp. 510; *Brush v. Kelsey*, 47 App. Div. 270, 62 N. Y. Supp. 214; *Blanck v. Spies*, 31 Misc. 19, 62 N. Y. Supp. 1039.

²⁰ See *Mead v. Tuckerman*, 105 N. Y. 557.

²¹, ²² *Jones v. Newton*, 33 State Rep. 823, 11 N. Y. Supp. 510.

²³ *Anon.*, 8 Super. Ct. (1 Duer) 596.

²⁴ *Birdseye v. Goddard*, 17 Wkly. Dig. 228.

²⁵ *Bishop v. Bishop*, 30 Abb. N. C. 296, 24 N. Y. Supp. 888; *Russell v. Lyth*, 66 App. Div. 290, 72 N. Y. Supp. 615.

²⁶ *Russell v. Lyth*, 66 App. Div. 290, 72 N. Y. Supp. 615. An express promise to pay need not be proved where an action is brought. *Nealis v. Meyer*, 21 Misc. 344, 47 N. Y. Supp. 156.

²⁷ *Geib v. Topping*, 83 N. Y. 46.

²⁸ *Fischer v. Raab*, 81 N. Y. 235.

disbursements.²⁹ A party to an action cannot escape liability for payment of the fees of the referee on the ground that the reference was ordered against his will, especially where the party did not object to the appointment of the person named as referee but participated in the trial before the referee.³⁰

— **Forfeiture of fees.** The forfeiture of the right to fees by reason of the referee's failure to file or deliver his report within sixty days has been considered in a preceding chapter.³¹ It should be kept in mind that the mere lapse of time does not preclude the right to fees unless notice of election to terminate a reference is served,³² though an offer to deliver on payment of fees made before the expiration of the sixty days is not a delivery such as to avoid the forfeiture.³³

§ 2194. Taxation of fees of county clerk or sheriff.

"Each county clerk or register of deeds, who claims any fees by virtue of his office, and each sheriff or coroner who upon the collection of an execution, or the settlement, either before or after the judgment, of an action or a special proceeding, claims any fees, which have not been taxed, must, upon the written demand of the person liable to pay the same, cause them to be taxed within the county, upon notice to the person making the demand, by a justice of the supreme court or the county judge. After such a demand is made, the officer cannot collect his fees until they have been so taxed."³⁴ This Code provision is for the benefit of the person who is to pay the fees and not for the benefit of the officer, and it follows that the taxation is proper only on the written demand of the person liable to pay the fees.³⁵ The fact that the plaintiff approves of the sheriff's fees does not preclude the right of the defendant to demand a

²⁹ *Duhrkop v. White*, 13 App. Div. 293, 43 N. Y. Supp. 190.

³⁰ *Russell v. Lyth*, 66 App. Div. 290, 72 N. Y. Supp. 615.

³¹ See ante, pp. 2625, 2628.

³² *Nealis v. Meyer*, 21 Misc. 344, 47 N. Y. Supp. 156.

³³ *Thornton v. Thornton*, 66 How. Pr. 119; *Bishop v. Bishop*, 30 Abb. N. C. 296, 24 N. Y. Supp. 888.

³⁴ Code Civ. Proc. § 3287.

³⁵ *Matter of Tamsen*, 23 App. Div. 389, 48 N. Y. Supp. 313.

taxation of such fees since otherwise other persons might question the accuracy of the sheriff's bill.³⁶ Notwithstanding that the motion to tax the fees of a sheriff should be made within the county of the action, yet where the trial takes place in another county, proceeding without objection to the taxation is a waiver.³⁷ The taxation must be by the order of a justice of the supreme court or a county judge and not by the order of the court at special term.³⁸

§ 2195. Mode of collecting sheriff's fees.

The fees of a sheriff, upon an execution against property, other than those with respect to which it is specially prescribed by statute, either that they must be paid by a particular person, or that they may be included in the costs of the party in whose favor the execution is issued, must be collected by virtue of the execution, in the same manner as the sum therein directed to be collected.³⁹

³⁶ *Solomon v. Saqui*, 13 Civ. Proc. R. (Browne) 167.

³⁷ *Nestor v. Bischoff*, 52 Hun, 614, 5 N. Y. Supp. 312.

³⁸ *Matter of Howe*, 66 App. Div. 7, 72 N. Y. Supp. 866.

³⁹ Code Civ. Proc. § 3309.

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CHAPTER I.

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ART. I. GENERAL RULES.

§ 2196. Definition.

An execution is the process of the court from which it is issued,¹ by which a court carries out its judgment or order.² It is the process issued to enforce the judgment rendered in a civil action by obtaining the means of satisfying the demand of the prevailing party as established. This writ has been in common use from an early period and its effectiveness has

¹ Code Civ. Proc. § 1364.

² See *Devlin v. Hinman*, 40 App. Div. 101, 57 N. Y. Supp. 663.

been generally the same in all cases, although at common law a further writ was sometimes necessary to authorize the sale of property.

§ 2197. Kinds.

There are four kinds of executions, as follows:

1. Against property.
2. Against the person.
3. For the delivery of the possession of real property, with or without damages for withholding the same.
4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.³

The latter two kinds of execution will be more particularly considered in a succeeding volume relating to special actions.

Executions may also be distinguished as those based on a judgment, those based on an order, and those based on the issuance of a writ of attachment as a provisional remedy.

§ 2198. Execution against the people.

An execution cannot be issued against the people.⁴

§ 2199. Disability of sheriff to act.

Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under-sheriff must proceed upon the execution, as the sheriff might have done. If there is no under-sheriff, the court, from which the execution issued, may designate a person to proceed thereupon, who may complete the same, as an under-sheriff might have done. The person so designated must give such security as the court directs. He is deemed an officer, and is subject to the same obligations and liabilities, and has the same power and authority, in relation to the object of his appointment, as a sheriff, and is entitled to fees accordingly. But this

³ Code Civ. Proc. § 1364.

⁴ Code Civ. Proc. § 1985.

section does not apply, in a case where special provision is otherwise made by law, for the enforcement of an execution, after the death, removal from office, or other disqualification of the sheriff or under-sheriff.⁵

ART. II. PROPRIETY OF REMEDY.

§ 2200. Enforcement of judgments by execution.

An execution may be issued to enforce a final judgment in the following cases:

1. Where it is for a sum of money, in favor of either party; or directs the payment of a sum of money.

2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.

3. In an action to recover a chattel, where it awards a chattel to either party.⁶

An execution is not allowed on a judgment in rem.⁷

Under the old practice a decree in chancery could be enforced only by attachment and sequestration, but since the Revised Statutes and the Codes a decree for the payment of money may be docketed and is enforceable by execution.⁸ Executions can issue only on final judgments; but a default judgment is a final judgment enforceable by execution though the default was opened where the judgment was required to stand as security and plaintiff recovered on a trial of the action.⁹ If a judgment is docketable an execution may be issued.¹⁰

If the order of restitution made by an appellate court on reversing a judgment, directs payment to a "party," the

⁵ Code Civ. Proc. § 1388.

⁶ Code Civ. Proc. § 1240. Action to compel cancellation and surrender of note is not an action to recover a chattel. *People v. Grant*, 41 Hun, 351, 355.

⁷ *Chapman v. Lemon*, 11 How. Pr. 235.

⁸ *Geery v. Geery*, 63 N. Y. 252.

⁹ *Flagg v. Cooper*, 11 Civ. Proc. R. (Browne) 421, 54 Super. Ct. (22 J. & S.) 50, 3 State Rep. 529, 25 Wkly. Dig. 501. Or execution may be issued on second judgment. *Holmes v. Rogers*, 2 N. Y. Supp. 501, 18 State Rep. 652.

¹⁰ *Harris v. Elliott*, 163 N. Y. 269.

proper remedy to enforce it is by execution,¹¹ though the rule is otherwise where the money is directed to be paid into the custody of the court.¹² In an action where the assignee in trust of a mortgage seeks the direction of the court as to the disposition of the proceeds, a judgment adjudging, among other things, that within five days from the service of a copy of the judgment and notice of entry thereof, the assignee shall pay a certain sum to the estate of a creditor, is a judgment directing the payment of a sum of money.¹³ Where an assignment for benefit of creditors is set aside as fraudulent, in an action wherein the judgment requires the assignee to pay over money remaining in his hands to a receiver appointed in the action, such judgment, in so far as it directs the payment of money, is enforceable by execution;¹⁴ and it is immaterial that the money was to be paid to a receiver¹⁵ who is not a party to the suit.¹⁶ An order of the appellate division directing a restitution of moneys, on reversing a judgment, is not a final judgment but instead a mere interlocutory order.¹⁷ Execution is the proper remedy though the payment is directed to be made out of a trust fund.¹⁸ Where part of the judgment cannot be enforced by execution such part may be enforced by contempt proceedings.¹⁹ A judgment for alimony may be enforced by execution.²⁰

§ 2201. Enforcement of orders by execution.

Section 779 of the Code authorizes an execution to enforce the payment of "costs of a motion or any other sum of money

¹¹ *O'Gara v. Kearney*, 77 N. Y. 423.

¹² *Devlin v. Hinman*, 40 App. Div. 101, 107, 57 N. Y. Supp. 663.

¹³ *Harris v. Elliott*, 163 N. Y. 269.

¹⁴ *Matter of Hess*, 48 Hun, 586, 1 N. Y. Supp. 811; *Meyers v. Becker*, 29 Hun, 567, 95 N. Y. 486.

¹⁵ *Matter of Hess*, 48 Hun, 586, 1 N. Y. Supp. 811.

¹⁶ *Geery v. Geery*, 63 N. Y. 252.

¹⁷ *Devlin v. Hinman*, 40 App. Div. 101, 57 N. Y. Supp. 663.

¹⁸ *Randall v. Dusenbury*, 41 Super. Ct. (9 J. & S.) 456.

¹⁹ *People v. Grant*, 41 Hun, 351, 356.

²⁰ *Miller v. Miller*, 7 Hun, 208.

directed by an order to be paid.” This Code section does not, however, apply where the money is directed to be paid into court, and not “to a party or other person to whom the order requires it to be paid”: nor does it furnish the exclusive remedy for the enforcement of an order.²¹ It does not apply to an order, in an action for divorce or separation, requiring the payment of alimony pendente lite.²² The collection of motion costs by an execution has been referred to in the chapter on costs.²³ If an attorney refuses to pay over moneys received by him, pursuant to an order of restitution, an execution may be issued against him.²⁴ So, an order, on a substitution of attorneys, requiring elients to pay the former attorney his compensation, may be enforced by execution.²⁵

§ 2202. Enforcement of judgments by contempt proceedings.

“In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court:

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.

2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section, in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.

3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except in a case specified in the next subdivision.

²¹ Order may be enforced by contempt proceedings. *Devlin v. Hinman*, 40 App. Div. 101, 104, 106, 57 N. Y. Supp. 663.

²² *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519. *Contra*, *Halsted v. Halsted*, 21 App. Div. 466, 47 N. Y. Supp. 649.

²³ See ante, § 2180.

²⁴ *Forstman v. Schulting*, 42 Hun, 643.

²⁵ *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111.

4. Where the judgment requires the payment of money into court, or to an officer of the court, except where the money is due upon a contract, express or implied, or as damages for nonperformance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced, as prescribed in this section, either simultaneously with, or before or after, the issuing of an execution thereupon, as the court directs.’’²⁶

Mr. Throop, in his note to this section, stated that the decision in *Gray v. Cook*, 24 How. Pr. 432, was responsible for section 1241, which is practically new, to avoid the remedy by execution entirely superseding the remedy by contempt proceedings.

Subdivision three is confusing. It would be much clearer if it read as follows: “3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except where it requires the payment into court or to an officer of the court money due on a contract, express or implied, or a sum as damages for nonperformance of a contract.” This seems to be the meaning of subdivision three. While an order of restitution, on reversing a judgment, is not itself a judgment, yet the judgment of reversal is an interlocutory judgment within this subdivision.²⁷

Formerly it was held that contempt proceedings were proper only where the judgment could not be enforced by execution,²⁸ but now a judgment requiring the payment of money into court or to an officer of the court, except in certain enumerated cases, may be enforced by contempt proceedings. What was probably intended by subdivision four was to include such judgments as should be recovered for moneys wrongfully withheld from the court or one of its officers by the defendant, which the court itself would be required to hold for or distribute among parties entitled to receive it.²⁹

²⁶ Code Civ. Proc. § 1241. See, also, vol. 1, pp. 333-339. Compelling payment of costs by contempt proceedings, see ante, § 2183.

²⁷ *Devlin v. Hinman*, 40 App. Div. 101, 106, 57 N. Y. Supp. 663.

²⁸ *Randall v. Dusenbury*, 41 Super. Ct. (9 J. & S.) 456.

²⁹ *Jacquin v. Jacquin*, 36 Hun, 378, 381, which holds that direction in

If defendant is in possession of money solely by virtue of the authority derived from a judgment, it cannot be said to be in his possession by virtue of a "contract or as damages for non-performance of a contract."³⁰ Subdivision four does not mean that a final judgment requiring the payment of money into court or to an officer of the court can never be enforced by execution but merely that, in addition, contempt proceedings may be instituted.³¹ A receiver is not necessarily an "officer of the court." If he is appointed by the judgment to collect the money it would seem that he is such an officer;³² but where he is a party to the action and his title to the money vested in him by virtue of his appointment as receiver, and the defeated party is directed to pay the moneys to the receiver as the legal owner, the moneys cannot be said to be directed to be paid to an "officer of the court."³³ A misappropriation of money by an officer of a corporation is a tort so that the action to compel him to account is not an action to recover "money due on a contract."³⁴

Service on the party of a certified copy of the judgment and a demand for performance of the act required by the judgment are conditions precedent to the right to institute contempt proceedings.³⁵

Where the judgment directs the conveyance of real property or directs a party to make a deposit or delivery, besides punishing the disobedient defendant, the court may require the sheriff to take and deposit or deliver the money or other personal property, or to convey the real property in conformity with the direction of the court.³⁶

judgment for divorce for payment of final costs to attorneys is not included since attorneys are not the officers intended in the subdivision.

³⁰ *Devlin v. Hinman*, 40 App. Div. 101, 57 N. Y. Supp. 663.

^{31, 32} See *Gildersleeve v. Lester*, 68 Hun, 535, 22 N. Y. Supp. 1028.

³³ *General Electric Co. v. Sire*, 88 App. Div. 498, 85 N. Y. Supp. 141.

³⁴ *Gildersleeve v. Lester*, 68 Hun, 535, 22 N. Y. Supp. 1028.

³⁵ *Delanoy v. Delanoy*, 19 App. Div. 295, 46 N. Y. Supp. 106.

³⁶ Code Civ. Proc. § 718.

Art. III. Issuance.

ART. III. ISSUANCE.

§ 2203. Who may issue.

As a general rule, an execution can only be issued at the instance of the attorney for the successful party, and it is, so far as the necessary directions in regard to a levy are concerned, under his control, and the clerk of the court has no power to issue it except at his request. As a matter of practice, it is generally taken by the attorney, and by him delivered to the sheriff, with proper instructions as to property that may be found and which is to be levied on.³⁷ There is an exception to the rule where the execution is based on a transcript of a justice's judgment, in which case only the county clerk can issue it.³⁸ Where the clerk of the court is the only person authorized to issue an execution, one issued by an attorney is invalid.³⁹ It may be issued by the clerk on the application of the assignee of the judgment.⁴⁰ The attorney for the assignee of the party recovering final judgment may have an execution as of course within five years after the entry of judgment.⁴¹

— **Executor or administrator.** An execution may be issued, in the name of an executor or administrator, in his representative capacity, on a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.⁴²

§ 2204. From what court.

Execution must be issued out of the court in which the

³⁷ Attorney other than one of record may issue writ. *Thorp v. Fowler*, 5 Cow. 446; *Cook v. Dickerson*, 8 Super. Ct. (1 Duer) 679.

³⁸ Code Civ. Proc. § 3017. The same rule applies when transcript of judgment of municipal court of N. Y. City is filed. What county clerk may issue, see *Vedder v. Lansing*, 44 Hun, 590, 8 State Rep. 725, 26 Wkly. Dig. 391.

³⁹ *Thompson v. Jenks*, 2 Abb. Pr. (N. S.) 229.

⁴⁰ *Wilgus v. Bloodgood*, 33 How. Pr. 289.

⁴¹ Code Civ. Proc. § 1375.

⁴² Code Civ. Proc. § 1829.

judgment was obtained,⁴³ unless the transcript of a lower court has been filed with the county clerk, as provided for by section 3043 of the Code, in which case the execution must be issued out of the county court.

§ 2205. Conditions precedent.

In order to authorize the issuance of an execution there must be an existing judgment. An execution cannot issue on a satisfied judgment.⁴⁴ Where the satisfaction is voidable it must be vacated before execution can issue.⁴⁵ So it is irregular to issue execution upon a judgment which is, *prima facie*, no longer in existence as a subsisting debt against a bankrupt or his property, without previously applying to the court upon notice to him.⁴⁶ So an execution falls with the vacation of the judgment.⁴⁷ But where a judgment has been recovered upon default, and such default is subsequently opened upon condition that the judgment stand as security, but no execution issue thereon until after the determination of the action, the plaintiff is entitled, after recovery upon the merits and entry of a judgment in his favor, to issue an execution upon the original judgment.⁴⁸ The recovery of a second judgment, in a suit on a former judgment, does not prevent the issuance of

⁴³ Writ issued out of wrong court is void. *Clarke v. Miller*, 18 Barb. 269. To same effect, *Niles v. Perry*, 29 How. Pr. 192.

⁴⁴ *Jackson v. Cadwell*, 1 Cow. 622; *Dundee Nat. Bank v. Wood*, 30 State Rep. 607, 9 N. Y. Supp. 351. Such an execution is void. *Swan v. Saddlemire*, 8 Wend. 676. So is a sale thereunder. *Jackson v. Anderson*, 4 Wend. 474. Sheriff cannot himself pay plaintiff and then levy the execution. *Jones v. Wilson*, 3 Johns. 434; *Sherman v. Boyce*, 15 Johns. 443; *Bigelow v. Provost*, 5 Hill, 566.

⁴⁵ *Ackerman v. Ackerman*, 14 Abb. Pr. 229. Followed in *Crotty v. McKenzie*, 42 Super. Ct. (10 J. & S.) 192, 201. See, also, *Anderson v. Nicholas*, 27 Super. Ct. (4 Rob.) 630.

⁴⁶ *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Alcott v. Avery*, 1 Barb. Ch. 347.

⁴⁷ *Spaulding v. Lyon*, 2 Abb. N. C. 203.

⁴⁸ *Flagg v. Cooper*, 11 Civ. Proc. R. (Browne) 421, 54 Super. Ct. (22 J. & S.) 50, 3 State Rep. 529, 25 Wkly. Dig. 501. Or he may issue execution on the second judgment. *Holmes v. Rogers*, 18 State Rep. 652, 2 N. Y. Supp. 501.

an execution on the first judgment.⁴⁹ The taking of an appeal to the appellate division does not prevent the issuance of an execution unless an undertaking is given or a stay of proceedings is ordered.⁵⁰

— **Entry of judgment and filing of judgment roll.** An execution cannot issue until judgment is entered and the judgment roll is filed;⁵¹ but it is not fatal, in the absence of prejudicial injury, that the roll was filed later but on the same day.⁵² And the better rule seems to be that if no rights of third persons intervene, a subsequent filing of the roll will validate the execution,⁵³ provided it is filed before the return day of the execution,⁵⁴ though it has been held that an execution issued before the filing of the roll is absolutely void.⁵⁵ So where a transcript is filed in a county clerk's office, delay in making an actual entry in the judgment book until after the issuance of the execution, is immaterial.⁵⁶ And an execution may be sent to the sheriff prior to the entry of judgment and filing of the roll if the sheriff is directed to indorse it as received on a subsequent day, on which day the judgment is perfected, where the levy was not made until thereafter.⁵⁷ Of course, if the rights of third persons intervene between the time of the issuance of the execution and the subsequent entry and filing of the roll, their rights will be superior to those of the execution creditor.⁵⁸

— **Docketing of judgment.** It is now settled that an execution cannot be issued until the judgment is docketed in the

⁴⁹ *Howard v. Sheldon*, 11 Paige, 558.

⁵⁰ Code Civ. Proc. § 1351.

⁵¹ *Hathaway v. Howell*, 6 T. & C. 453, 4 Hun, 270; *Barrie v. Dana*, 20 Johns. 307.

⁵² *Small v. McChesney*, 3 Cow. 19; *Clute v. Clute*, 4 Denio, 241.

⁵³ *Chichester v. Cande*, 3 Cow. 39. To same effect, *Jordan v. Posey*, 1 How. Pr. 123.

⁵⁴ *Bank of Rochester v. Emerson*, 10 Paige, 115.

⁵⁵ *Hathaway v. Howell*, 6 T. & C. 453, 4 Hun, 270.

⁵⁶ *Appleby v. Barry*, 25 Super. Ct. (2 Rob.) 689.

⁵⁷ *Walters v. Sykes*, 22 Wend. 566.

⁵⁸ *Marvin v. Herrick*, 5 Wend. 109. See *Clute v. Clute*, 4 Denio, 241.

county wherein the execution is to issue.⁵⁹ The omission is however, a mere irregularity, so that the execution cannot be questioned collaterally.⁶⁰

§ 2206. General rule as to computation of time.

The time during which a person entitled to enforce a judgment is stayed from enforcing it, by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not part of the time limited for issuing an execution thereon or for making an application for leave to issue such an execution.⁶¹

§ 2207. Substitutes for scire facias.

Where leave of court is required, the Code has abolished the writ of scire facias and given two distinct and different remedies as substitutes; the one applicable in cases where there has been a delay in the issuing of execution for five years and the judgment debtor is still living, and the other in cases where the judgment debtor has died after judgment.

§ 2208. Within five years.

At common law the right to issue an execution in a personal action was lost unless the writ was issued within a year and a day from the entry of the judgment. The Code provides that, "except as otherwise specially prescribed by law, the party recovering a final judgment, or his assignee, may have execution thereupon, of course, at any time within five years after

⁵⁹ Code Civ. Proc. § 1365; *Dunham v. Reilly*, 110 N. Y. 366; *Kupfer v. Frank*, 30 Hun. 74. See, also, *Longuemare v. Nichols*, 18 Civ. Proc. R. (Browne) 93, note, 27 State Rep. 266, 7 N. Y. Supp. 672; *Nanz v. Oakley*, 60 Hun. 431, 39 State Rep. 327, 21 Civ. Proc. R. (Browne) 71, 15 N. Y. Supp. 1. This rule does not apply to a judgment of the city court of Yonkers. *Prime v. Anderson*, 29 Hun. 644. Rule under Laws of 1813. *Sweetland v. Buell*, 164 N. Y. 541.

⁶⁰ *Roth v. Schloss*, 6 Barb. 308.

⁶¹ Code Civ. Proc. § 1382. Following decision in *Underwood v. Green*, 56 N. Y. 247. For construction of a somewhat similar statute (Code Civ. Proc. § 406), see vol. 1, pp. 502-505.

the entry of the judgment.”⁶² The phrase “except as otherwise specially prescribed by law” applies where the judgment debtor has died after judgment but before the expiration of the five years. An execution may be issued immediately after the judgment is entered and docketed and the judgment roll filed,⁶³ except that if a promise is made before judgment not to enforce it within a specified time thereafter, no execution can issue until the expiration of such time.⁶⁴ It seems that the appointment of a receiver in supplementary proceedings after the entry of a judgment in favor of another creditor does not prevent the latter from issuing an execution on his judgment without leave of court and without notice to the receiver.⁶⁵

— **On death of judgment creditor.** If the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives. If the judgment has been assigned execution may be issued within the five years by the assignee. In either case, the execution must be indorsed with the name and residence of the person issuing the same.⁶⁶ The object of this Code section was to avoid the necessity of a *scire facias* on the death of the judgment creditor.

— **When time begins to run.** The five years runs from the time of “docketing” the judgment,⁶⁷ and the day on which the judgment is docketed must be included in the computation.⁶⁸

§ 2209. After five years.

After the lapse of five years from the entry of a final judg-

⁶² Code Civ. Proc. § 1375.

⁶³ *Swift v. De Witt*, 1 Code R. 25, 6 N. Y. Leg. Obs. 314, 3 How. Pr. 280.

⁶⁴ So held where judgment was by confession. *Merritt v. Baker*, 11 How. Pr. 456.

⁶⁵ *Cooper v. Bailey*, 69 App. Div. 358, 74 N. Y. Supp. 667.

⁶⁶ Code Civ. Proc. § 1376.

⁶⁷ *Kupfer v. Frank*, 30 Hun, 74.

⁶⁸ *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54.

ment, execution can be issued thereupon, in one of the following cases only:

1. Where an execution was issued thereupon within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the execution.⁶⁹

In other words, leave of court must be obtained if five years have elapsed, unless an execution has been issued within the five years and returned unsatisfied.⁷⁰ This requirement for leave to issue execution has an historical origin. Under the Revised Statutes, if execution was not issued within two years after judgment, the plaintiff might sue out a writ of scire facias, by which the sheriff was required to summon the party against whom it was issued to appear at a certain day, to show cause, if he had anything to say, why the plaintiff ought not to have execution of the judgment, but if an execution had once been sued out within the two years a scire facias was unnecessary. The issuing and return of the execution unsatisfied creates a presumption that the judgment is unpaid, while a failure to issue an execution for the period named creates a presumption that the judgment has been satisfied or released, which may be rebutted, and the opportunity to rebut this presumption which was afforded by scire facias is now furnished on the hearing of the motion for leave to issue the execution.

However, an execution issued without leave after the lapse of five years is not void but merely liable to be set aside on motion;⁷¹ and the supplementary proceedings based thereon should not be set aside merely because of the failure to obtain leave, if the merits have been fully investigated and

⁶⁹ Code Civ. Proc. § 1377.

⁷⁰ *Wade v. De Leyer*, 40 Super. Ct. (8 J. & S.) 541; *Duryee v. Botsford*, 24 Hun, 317.

⁷¹ *Winebrener v. Johnson*, 7 Abb. Pr. (N. S.) 202; *Wooster v. Wuterich*, 2 Abb. N. C. 206; *Frean v. Garrett*, 24 Hun, 161. Such an execution may be made the basis of a creditor's suit. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54.

the parties entitled to leave have acted in good faith.⁷² And an execution may issue, even after five years, on consent of defendant, without any previous order of court.⁷³ The mere fact that leave to issue an execution is denied more than five years after the entry of judgment does not preclude the right of the judgment creditor to issue an execution without leave of court on his subsequently ascertaining that a previous execution had been issued within five years.⁷⁴

— **Proceedings to obtain leave of court.** Section 1378 of the Code provides as to the notice and affidavits on a motion for leave to issue execution after the lapse of five years. This section does not apply, however, where the judgment debtor has died.⁷⁵ It seems that the motion may be made by an assignee of the judgment.⁷⁶

Notice of the application must be served personally upon the adverse party, if he is a resident of the state, and personal service can, with reasonable diligence, be made upon him therein; otherwise, notice must be given in such manner as the court directs.⁷⁷

Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted except on proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.⁷⁸ The burden of proving such fact is on the moving party.⁷⁹ The judgment debtor is confined, in his opposing affidavits, to a showing that the judgment has been paid or otherwise discharged, in whole or in part. If defendant denies that anything is due on the judgment it is proper to direct a reference to report the amount due.

It has been held that the court has no discretion if the facts

⁷² *National Bank of Port Jervis v. Hansee*, 15 Abb. N. C. 488.

⁷³ *Hulbut v. Fuller*, 3 Code R. 55. To same effect, *Merritt v. Wing*, 4 How. Pr. 14.

⁷⁴ *Cooper v. Bailey*, 69 App. Div. 358, 74 N. Y. Supp. 667.

⁷⁵ *Marine Bank of Chicago v. Van Brunt*, 11 Hun, 379.

⁷⁶ *Betts v. Garr*, 26 N. Y. 383.

^{77, 78} Code Civ. Proc. § 1378.

⁷⁹ *Michaels v. Abrahams*, N. Y. Daily Reg., March 6, 1883.

stated in the moving papers are uncontradicted,⁸⁰ but if they are disputed the court has discretion.⁸¹ The court cannot inquire into the validity of the judgment,⁸² since the only proper inquiry is whether any part of the judgment remains due.⁸³ Pendency of supplementary proceedings is no objection,⁸⁴ nor is the bringing of an action on the judgment and the recovery of a new judgment.⁸⁵ The motion cannot be denied because of the existence of an alleged right to set-off judgments though the court may withhold its decision to allow the making of a motion for a set-off.⁸⁶ Leave to issue execution after the lapse of five years should be granted where defendant obtained a discharge in insolvency shortly after the rendition of the judgment and such discharge was subsequently declared void.⁸⁷ Of course, execution will not be permitted to issue "nunc pro tunc" after the lapse of several years.⁸⁸

Leave may be granted to issue an execution on a judgment in ejectment though twenty years have elapsed since the rendition of the judgment,⁸⁹ though the rule seems to be to the contrary where the judgment is a money judgment, unless there is proof of payment or written acknowledgment within the twenty years.⁹⁰ It seems that leave may be granted, after

⁸⁰ *Betts v. Garr*, 26 N. Y. 383; *Nichols v. Kelsey*, 2 City Ct. R. 410, 13 Civ. Proc. R. (Browne) 154, 20 Abb. N. C. 14.

⁸¹ In such a case the order is not reviewable in the court of appeals. The proper remedy is to move for leave to sue on the judgment. *Shuman v. Strauss*, 52 N. Y. 404.

⁸² *Lee v. Watkins*, 3 Abb. Pr. 243, 13 How. Pr. 178. Followed in *Matter of Armstrong*, 35 Misc. 327, 71 N. Y. Supp. 951. Service of process. *Mereness v. Brenon*, 7 Wkly. Dig. 24.

⁸³ *Betts v. Garr*, 26 N. Y. 383.

⁸⁴ *Smith v. Mahony*, 3 Daly, 285.

⁸⁵ *Small v. Wheaton*, 2 Abb. Pr. 316, 4 E. D. Smith, 427.

⁸⁶ *Betts v. Garr*, 26 N. Y. 383.

⁸⁷ *Small v. Wheaton*, 2 Abb. Pr. 316, 4 E. D. Smith, 427.

⁸⁸ *Hanse v. Fiero*, 25 Abb. N. C. 46, 56 Hun, 463, 31 State Rep. 360, 10 N. Y. Supp. 494.

⁸⁹ *Van Rensselaer v. Wright*, 121 N. Y. 626; *Shultes v. Sickles*, 70 Hun, 479, 53 State Rep. 700, 24 N. Y. Supp. 145.

⁹⁰ *Kennedy v. Mills*, 4 Abb. Pr. 132; *Kincaid v. Richardson*, 9 Abb. N. C. 315.

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five years, though an action on the judgment has become barred by limitations.⁹¹ So the fact that the statute of limitations has barred an action on a judgment of a justice of the peace does not prevent the supreme court from permitting an execution to be issued on such a judgment where a transcript is filed in the county clerk's office before the right to sue on the judgment is barred by limitations.⁹²

— Form of affidavit.

[Title of court and action.]

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That a final judgment was rendered in the ——— court, in the above-entitled action, in favor of ——— against ———, for the sum of ———, and it was duly docketed and the judgment roll filed in the county clerk's office of ——— county on the ——— day of ———, 190—.

III. That no execution has ever been issued on said judgment which remains wholly unsatisfied [if partly unsatisfied state amount collected, and when, and amount due] and no part thereof has been paid or collected.⁹³

IV. [If order to show cause is sought, add:] An order to show cause is sought because it is necessary that such order provide for the manner of giving notice of the application for leave to issue execution to ——— [the judgment debtor] who resides out of this state at ———, in the state of ———.

V. That no previous application has been made, etc.

[Jurat.]

[Signature.]

— Form of order granting leave to issue execution.

[Title of action.]

At a special term, etc.

On reading and filing the affidavit of ———, verified on the ———

⁹¹ Kincaid v. Richardson, 25 Hun, 237.

⁹² Rose v. Henry, 37 Hun, 397; Herder v. Collyer, 22 Abb. N. C. 461, 6 N. Y. Supp. 513; Becker v. Porter, 17 App. Div. 183, 79 State Rep. 296, 45 N. Y. Supp. 296; Agar v. Curtiss, 8 App. Div. 337, 40 N. Y. Supp. 815.

⁹³ If judgment has been assigned and affidavit is made by the assignee, such fact should be stated and the allegation as to payments before the assignment should be on information and belief.

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day of ———, 190—, whereby it is proved to the satisfaction of the court that the judgment in this action remains wholly [or partly] unsatisfied, and on reading and filing [specify the other motion papers, and opposing papers], with proof of service thereof on ———, and after hearing ——— in support of the motion and ——— in opposition: Now, on motion of ———, attorney for ———:

Ordered, that the motion of ——— for leave to issue execution on the final judgment entered in this action and docketed on the ——— day of ———, 190—, for ——— dollars, be and the same hereby is granted.

Enter: [Signature of judge by initials of name and title.]

§ 2210. After death of defendant in ejectment.

Where a party, or one or more of several parties against whom a judgment for the recovery of possession of real property has been obtained, has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered, and to the grantees or devisees of said deceased, or if he died intestate, to the heirs-at-law of said deceased; said notices to be served in the same manner as a summons is directed to be served in an action in the supreme court.⁹⁴

§ 2211. After death of a judgment debtor.

An execution to collect a sum of money cannot be issued against the property of a judgment debtor who has died since the entry of the judgment, except as prescribed in sections 1380 and 1381 of the Code⁹⁵ which will now be considered. Thus, the execution referred to in section 1252 of the Code,⁹⁶ where the judgment debtor has died, can be enforced only as provided in sections 1380 and 1381.⁹⁷ The Code provisions to be considered do not, however, affect the right of a judgment creditor to enforce a judgment against the property of one or more surviving judgment debtors as if all the judgment debtors were living. In that case, an execution must be issued in the

⁹⁴ Code Civ. Proc. § 1376. Form of affidavit, notice of motion, and order, see 2 Abb. New Pr. & F. 1037-1039.

⁹⁵ Code Civ. Proc. § 1379.

⁹⁶ See ante, § 2004.

⁹⁷ Atlas Refining Co. v. Smith, 52 App. Div. 109, 64 N. Y. Supp. 1044.

Art. III. Issuance.—After Death of a Judgment Debtor.

usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution out of any property which belonged to him.⁹⁸

Section 1380 is long but by splitting it up its meaning can be made clearer. When the present Code was first enacted this provision merely embraced what is now contained in the first two sentences, viz.: "After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and a decree to the same effect is procured from a surrogate's court of this state, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor." This one year limitation applies not only to judgments rendered in courts of record but also to judgments rendered in courts not of record where transcripts have been filed with the county clerk, while the limitation of three years after issuing of letters applies only to judgments originally rendered in courts of record.⁹⁹ The words "such an execution" contained in the second sentence include executions issued on judgments which are not, because of the lapse of ten years, as well as those which are, liens on the real property of a judgment debtor.¹⁰⁰ These two sentences apply only to an execution against personal property of the decedent.

The third sentence is as follows: "Where the lien of the judgment was created as prescribed in section 1251 of the Code, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of

⁹⁸ Code Civ. Proc. § 1383. See *Woodcock v. Bennet*, 1 Cow. 711.

⁹⁹ *Matter of Phelps*, 6 Misc. 397, 26 N. Y. Supp. 774.

¹⁰⁰ *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N. Y. Supp. 1044.

the decedent, and for that purpose such a lien existing at the decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll." In other words where a judgment is docketed in a county clerk's office so as to become a lien on the real property and chattels real in that county, the lien is not limited to ten years but is extended three years and six months after the death of the judgment debtor; and an execution against real property or chattels real cannot be issued until three years after the death of the judgment debtor.¹⁰¹ The fourth and fifth sentences, inserted by amendment in 1885, make an exception to this rule as follows: "But where the decedent died intestate and letters of administration upon his estate have not been granted within three years after his death by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the state at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the surrogate's court of the county in which the property on which the judgment is a lien is situated, such court may grant the decree where it appears that the decedent did not leave any personal property within the state upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for three years and six months as aforesaid."

The sixth sentence provides that the judgment lien may be enforced by proceedings in surrogate's court for the disposition of the real property of the decedent for the payment of his debts. This remedy, instead of an execution, is preserved and is resorted to more often than an execution.

The seventh sentence provides that nothing contained in the preceding clauses shall preclude the right of a judgment creditor who has obtained a judgment setting aside a fraudulent conveyance from enforcing such judgment by execution against the property fraudulently conveyed, without obtain-

¹⁰¹ Duell v. Alvord, 41 Hun, 196. See Matter of Holmes, 131 N. Y. 80; Matter of Matteson, 50 State Rep. 275, 21 N. Y. Supp. 576.

ing leave of court.¹⁰² This sentence which was added in 1890 applies only where the conveyance has been declared fraudulent.¹⁰³

Considering section 1380 as a whole, it is held that it applies only where the judgment debtor dies after, and not before, execution is issued.¹⁰⁴ If an execution is issued within five years and thereafter the debtor dies, a new execution cannot be issued as of course but leave must be obtained under this section.¹⁰⁵ Both leave of the surrogate and the order of the court in which the judgment was entered are necessary to authorize the execution.¹⁰⁶ An execution issued without leave of court, after the death of the judgment debtor, is not merely voidable but is void.¹⁰⁷ The statute applies equally to judgments recovered on sole, joint, or on joint and several, contracts.¹⁰⁸

— **Application to court from which execution is to be issued.** “Notice of the application to the court from which the execution is to be issued, for an order granting leave to issue the execution, must be given to the person or persons whose interest in the property will be affected by a sale by virtue of the execution, and also to the executor or administrator of the judgment debtor. The general rules of practice may prescribe the manner in which the notice must be given; until provision is so made therein, it must be served either personally or in such manner as the court prescribes in an order to show cause.”¹⁰⁹ The execution is void as to persons interested in the property against which the execution issued where such persons are not made parties to the proceedings to obtain leave.¹¹⁰ The application cannot be made to a judge out of

¹⁰² See *Bryer v. Foerster*, 14 App. Div. 315, 43 N. Y. Supp. 801.

¹⁰³ *Matter of Holmes*, 131 N. Y. 80.

¹⁰⁴ *Wood v. Morehouse*, 45 N. Y. 368, 374.

¹⁰⁵ *Marine Bank of Chicago v. Van Brunt*, 11 Hun, 379. *Contra*, *Flanagan v. Tinen*, 53 Barb. 587, 37 How. Pr. 130.

¹⁰⁶ *Marine Bank of Chicago v. Van Brunt*, 49 N. Y. 160.

¹⁰⁷ *Wallace v. Swinton*, 64 N. Y. 188; *Prentiss v. Bowden*, 145 N. Y. 342.

¹⁰⁸ *Baskin v. Huntington*, 130 N. Y. 313, 41 State Rep. 635.

¹⁰⁹ Code Civ. Proc. § 1381, subd. 1.

¹¹⁰ *Wallace v. Swinton*, 64 N. Y. 188

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court unless by consent.¹¹¹ The application may be made before leave has been obtained from the surrogate's court,¹¹² since it is immaterial to which court application is first made.¹¹³ The general rules of practice do not prescribe the manner in which the notice must be given. If personal service can be made on the executor or administrator and on the other parties interested in the property against which the judgment is sought to be enforced, no application to the court as to the mode of service is necessary; but if personal service cannot be made on such persons an application should be made, on affidavits fully stating the facts in regard thereto, for an order to show cause.

Leave shall not be granted except on proof by affidavit,¹¹⁴ to the satisfaction of the court that the judgment remains wholly or partly unsatisfied.¹¹⁵ The affidavit need not be made by a party to the judgment.¹¹⁶ It may be made by one of two joint plaintiffs.¹¹⁷ A positive averment that the judgment is unsatisfied and unpaid and is valid and subsisting is sufficient as to that fact.¹¹⁸ So is a mere allegation that the judgment "is wholly unsatisfied and unpaid."¹¹⁹

Though the motion papers should describe the land on which the judgment is a lien and against which an execution is sought, yet it is not necessary to describe other lands than those against which it is sought to enforce the judgment.¹²⁰

¹¹¹ *Matter of Wadley*, 29 Hun, 12.

¹¹² *Kerr v. Kreuder*, 28 Hun, 452.

¹¹³ *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N. Y. Supp. 1044. Compare, however, *Matter of Phelps*, 6 Misc. 397, 26 N. Y. Supp. 774, which holds that application should be made first to court from which execution is to issue. It is submitted that it is the better practice to apply to the surrogate last.

¹¹⁴ Petition without affidavit is insufficient. *Matter of Holmes*, 59 Hun, 369, 36 State Rep. 535, 13 N. Y. Supp. 100.

¹¹⁵ Code Civ. Proc. § 1381, subd. 1.

¹¹⁶ Assignee of judgment may make. *Duell v. Alvord*, 41 Hun, 196, 198.

¹¹⁷, ¹¹⁸ *Wadley v. Davis*, 30 Hun, 570.

¹¹⁹ *Duell v. Alvord*, 41 Hun, 196, 4 State Rep. 197.

¹²⁰ *Wadley v. Davis*, 30 Hun, 570.

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Leave will not be granted as a matter of course.¹²¹ The form of the order may be that execution be issued in due form of law upon said judgment for the amount due thereon and interest, against any property, lands, tenements, real estate, or chattels real, upon which such judgment shall be a lien, either at law or in equity, in the same manner and with the same effect as if the said defendant were still living.¹²²

— Form of affidavit.

[Title of court and action.]

[Venue.]

A. X., being duly sworn, says:

I. That he is the ———.

II. [Same as II in form of affidavit under section 2209.]

III. That said ——— died intestate in ——— county in which he resided, on the ——— day of ———, 190—, leaving ——— as his only heirs at law, and letters of administration were duly granted on said estate by the surrogate of ——— county, on the ——— day of ———, 190—, to ———, who has duly qualified as such.¹²³

IV. That the said judgment remains wholly unsatisfied and unpaid.¹²⁴

V. That on the ——— day of ———, 190—, after the time the judgment was duly docketed in the said ——— county, the said ——— was the owner of real property situated therein, on which the said judgment was and still is a lien. [Add description of property.]

VI. That no application for leave to issue execution on said judgment has been made to the surrogate's court of ——— county or of any other county. [If application is pending so state. If decree has been made, state time when granted and annex a copy.]

VII. [If order to show cause is sought, add:] An order to show cause is necessary because such order should provide as to the manner of giving notice of this application for leave to issue execution to the persons whose interest in the said property will be affected by

¹²¹ *Kenny v. Geoghegan*, 9 Civ. Proc. R. (Browne) 378.

¹²² *Wilgus v. Bloodgood*, 33 How. Pr. 289.

¹²³ If deceased left a will such fact should be stated together with the fact of its being admitted to probate, the names of the devisees, the granting of letters testamentary, and the qualification of the executor. If defendant died intestate and three years have elapsed since his death without letters of administration being taken out, such fact should be stated.

¹²⁴ If partly unsatisfied, so state and show balance due.

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a sale by virtue of the execution inasmuch as — and — are not residents of this state but reside in — in the state of —.

VIII. That no previous application has been made, etc.

[Jurat.]

[Signature.]

— Form of order.

[Title of action.]

At a special term, etc.

On reading and filing the affidavit of —, verified on the — day of —, and [specify other motion papers] whereby it appears that [here state concisely the facts on which the application is based as set forth in the moving affidavit together with the names of the persons served with notice of the application], and after hearing —, attorney for —, in support of the motion and —, attorney for —, in opposition thereto: Now, on motion of —, attorney for —:

Ordered, that leave be and hereby is granted to — to issue an execution for — dollars on said judgment to be enforced against the said property on which it is a lien with like effect as if the said judgment debtor were still living. Said property is described as follows:—

Enter: [Signature of judge by initials of name and title.]

— Application to surrogate's court. For the purpose of procuring a decree from the surrogate's court granting leave to issue the execution, the judgment creditor must present to that court a written petition, duly verified, setting forth the facts, and praying for such a decree; and that the executor or administrator of the judgment debtor and the person or persons whose interest in the property will be affected by a sale by virtue of the execution may be cited to show cause why it should not be granted.¹²⁵ The petition must be verified.¹²⁶ The petition should set forth the facts of the administration of the estate of the judgment debtor, the recovery of the judgment, the granting of leave by the court from which the execution is to be issued, etc., and the names and residences, so far as known, of the persons whose interests in the property will be affected by a sale by virtue of the execution.¹²⁷ And it is the better practice, on an application affecting real estate, to set forth also a description of the real estate to be

¹²⁵ Code Civ. Proc. § 1381, subd. 2.

¹²⁶ Matter of Howell, 2 Redf. 299.

¹²⁷ Redfield, Pr. Surr. Cts. 568. For form of petition, see Redfield, Pr. Surr. Cts. 1015; 2 Abb. New Pr. & F. 1049.

affected by the proceeding.¹²⁸ Upon the presentation of the petition the surrogate must issue a citation accordingly, which said citation may be served in the same manner as is a notice in the court from which the execution is to be issued, to the executor or administrator of the judgment debtor, and the persons whose interest in the property will be affected by a sale under the execution, and, if the general rules of practice of the supreme court do not provide for a mode of giving such notice, such citation must be served in such manner as the surrogate by order may prescribe, or as is otherwise provided by law.¹²⁹ However, if the parties interested appear voluntarily without citation upon the presentation of the petition, they are bound by the decree.¹³⁰

On the return of the citation, the surrogate may make such a decree in the premises as justice requires.¹³¹ No particular facts need be proven to authorize the surrogate to grant leave.¹³² The surrogate cannot determine whether the judgment was fraudulently obtained.¹³³ It is erroneous for the surrogate to grant leave to issue execution subject to the alternative that the administrator apply for a sale of the real estate, especially if it does not appear that the time to make such application has elapsed.¹³⁴

§ 2212. On judgments against executors or administrators.

Under the Revised Statutes an execution on a judgment against personal representatives could issue at once, provided his account had been settled, for a just proportion of the as-

¹²⁸ *Matter of Bently*, 16 Abb. Pr. 89.

¹²⁹ Code Civ. Proc. § 1381, subd. 2. Rules as to notice on application to the court from which the execution is to be issued, as laid down in preceding section, apply.

¹³⁰ *Kerr v. Kreuder*, 28 Hun, 452.

¹³¹ Code Civ. Proc. § 1381, subd. 2. Form of decree, see 2 Abb. New Pr. & F. 1050.

¹³² *Allyn v. Thurston*, 5 Hun, 105.

¹³³ *Freeman v. Nelson*, 4 Redf. 374.

¹³⁴ *St. John v. Voorhies*, 19 Abb. Pr. 53.

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sets applicable to the satisfaction of the judgment.¹³⁵ But under the present Code provision an execution cannot be issued upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued.¹³⁶ This Code provision is inapplicable to judgments in actions originally commenced against the decedent,¹³⁷ and to decrees of the surrogate's court against an executor or administrator.¹³⁸ So the rule does not apply to the case of a judgment against a firm of which decedent as well as his executor were members.¹³⁹ A surrogate has the same power to direct execution on a judgment recovered against an administrator for liabilities incurred by him in the administration of the estate, as he has to order such process to issue on a judgment for a debt owing by the deceased.¹⁴⁰

— **Time for application.** The application may be made at any time after judgment. An appeal from a judgment obtained against the executor in his representative capacity is no bar to the motion where no undertaking has been given on appeal.¹⁴¹ Of course, if a stay of proceedings exists it is proper to refuse leave to issue execution until the result of the appeal is announced.¹⁴²

— **Notice of application.** At least six days' notice of the application must be personally served on the executor or administrator unless it appears that service cannot be so made with due diligence; in which case, notice must be given to such persons, and in such manner, as the surrogate directs,

¹³⁵ *Olmsted v. Vredenburg*, 10 How. Pr. 215; *Smith v. Howell*, 2 Redf. 325; *Redfield*, Pr. Surr. Cts. 564.

¹³⁶ Code Civ. Proc. § 1825.

¹³⁷ *Thacher v. Bancroft*, 15 Abb. Pr. 243.

¹³⁸ *Peyser v. Wendt*, 2 Dem. 221.

¹³⁹ *Columbus Watch Co. v. Hodenpyl*, 61 Hun, 557, 16 N. Y. Supp. 337.

¹⁴⁰ *Matter of Thompson*, 41 Barb. 237.

¹⁴¹ *Matter of Morey*, 6 Dem. 287, 10 State Rep. 693.

¹⁴² *Keyser v. Kelly*, 4 Redf. 157.

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by an order to show cause why the application should not be granted.¹⁴³

—**Petition.** The petition must be signed and verified.¹⁴⁴ It must show not only that the executor has assets, but also that they are applicable and available for the payment of the judgment,¹⁴⁵ i. e., whether the assets of the estate are sufficient to pay the whole judgment without injuriously affecting the rights of others entitled to equality of payment with the creditor.¹⁴⁶ It has been held, however, that the petition is sufficient if it states that there are assets in the hands of the executor sufficient to satisfy the judgment, and it is for the executor to show their inadequacy to pay all the creditors.¹⁴⁷ It is submitted that the latter holding is the better rule since the judgment creditor's knowledge of the assets of the estate is presumably inferior to the knowledge of the executor or administrator. It must show that the representative has funds of the estate on hand applicable to the payment of the judgment which he refuses to apply, or that funds of the estate have been misapplied which ought to have been devoted to the payment of the judgment.¹⁴⁸

The executor or administrator may controvert the facts set up in the petition. If the assets have been materially reduced since the account, the representative should show the fact, distinctly, in opposition.¹⁴⁹ It is not sufficient merely to allege publication of the usual notice to creditors to present claims and the nonpresentation of petitioner's claim, and state assets received and payments for expenses and debts showing balance due himself, but not showing that he had accounted.¹⁵⁰

¹⁴³ Code Civ. Proc. § 1826. Form of notice, see 2 Abb. New Pr. & F. 1053. Form of order to show cause, see Redfield, Pr. Surr. Cts. 1013; 2 Abb. New Pr. & F. 1053.

¹⁴⁴ Matter of Howell, 2 Redf. 299. Form, see 2 Abb. New Pr. & F. 1051; Redfield, Pr. Surr. Cts. 1012.

¹⁴⁵ Matter of Lazelle's Estate, 16 Misc. 515, 40 N. Y. Supp. 343; Hault v. Gano, 1 Dem. 36; Melcher v. Fisk, 4 Redf. 22.

¹⁴⁶ Sippel v. Macklin, 2 Dem. 219.

¹⁴⁷ Matter of Steinau, 23 App. Div. 550, 48 N. Y. Supp. 886.

¹⁴⁸ Matter of Gall's Estate, 40 App. Div. 114, 57 N. Y. Supp. 835.

¹⁴⁹ Smith v. Howell, 2 Redf. 325.

¹⁵⁰ Keyser v. Kelly, 4 Redf. 157.

— **Matters considered and decree.** “Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies, or other claims of the class to which the plaintiff’s claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff’s just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum directed to be collected by the first execution is less than the plaintiff’s just proportion.”¹⁵¹ The clause “for claims entitled to priority against the plaintiff” was, according to Mr. Throop, intended to include not only the common cases, where legacies are postponed to debts, and certain debts to others, but also a class of cases where the assets must, according to well recognized rules, be applied to the payment of debts, to the exclusion of some legacies rather than others. If an accounting has been had it is a mere matter of calculation if the balance of the assets is insufficient to pay in full all claims of an equal degree, to ascertain the pro rata share for which the execution shall issue. If the assets are admittedly sufficient then it will issue for the whole amount due.¹⁵² If there has been no accounting and a question is raised as to the sufficiency of the assets, the surrogate may, under section 2723 of the Code, require an intermediate accounting; and if it appears that there are no assets then no execution can be issued.¹⁵³ If there appear to be no assets in the hands of the executor or administrator, an order granting leave cannot be sustained on the ground that the executor or administrator had paid other claims of inferior right, or had neglected to reduce to possession certain assets to which he ought to have

¹⁵¹ Code Civ. Proc. § 1826.

¹⁵² *Smith v. Howell*, 2 Redf. 325.

¹⁵³ *Matter of Jansen*, 1 Con. 362, 9 N. Y. Supp. 451. Intermediate accounting. *Peters v. Carr*, 2 Dem. 22; *Matter of Dougherty’s Estate*, 15 State Rep. 743; *Matter of Congregational Unitarian Soc.*, 34 App. Div. 387, 54 N. Y. Supp. 269; *Estate of Kelsey*, 4 Month. Law Bul. 56.

resorted.¹⁵⁴ The surrogate cannot authorize execution to issue on a judgment against an executor where the assets are sufficient to pay but a small proportion of the claims of the class, and the court is unable to determine the amount for which execution should issue.¹⁵⁵ So execution against an administrator will not be granted after he has accounted for all the assets coming into his hands, paid them to creditors under direction of the surrogate, and been duly discharged on a final accounting.¹⁵⁶ In computing the amount of assets, the claim of the attorney or counsel of the representative, for professional services rendered to him, and not upon the retainer of the deceased, in the unsuccessful defense of the applicant's judgment, cannot be deducted.¹⁵⁷ The surrogate cannot go back of the judgment to determine its validity.¹⁵⁸ The order must specify the sum to be collected.¹⁵⁹

Execution on a judgment against executors or administrators cannot be issued against the real estate of the debtor;¹⁶⁰ and this is so although the will authorizes a sale for the purposes of administration and distribution, unless the judgment is by its terms made a lien on the real estate, as the doctrine of equitable conversion does not apply.¹⁶¹

— **Requiring security of legatee.** Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order, permitting an execution to be issued thereupon, may, and, in a proper case, must, require the applicant to file in his office, an undertaking to the defendant, in such a sum, and with such sureties, as the surrogate directs, to the effect, that if, after collection of any sum of money by virtue of the

¹⁵⁴ *St. John v. Voorhies*, 19 Abb. Pr. 53.

¹⁵⁵ *Matter of Hesdra's Estate*, 23 N. Y. Supp. 842.

¹⁵⁶ *Matter of Hathaway's Estate*, 24 N. Y. Supp. 468.

¹⁵⁷ *Field v. Field*, 2 Redf. 160. See, also, *Matter of Nichols*, 4 Redf. 288.

¹⁵⁸ *Keyser v. Kelly*, 4 Redf. 157.

¹⁵⁹ Code Civ. Proc. § 1825. For form of order that execution issue, see *Redfield*, Pr. Surr. Cts. 1014; 2 Abb. New Pr. & F. 1056.

¹⁶⁰ *James v. Beesly*, 4 Redf. 236, 240; *Matter of Jansen*, 1 Con. 362.

¹⁶¹ *Matter of Hesdra's Estate*, 23 N. Y. Supp. 842.

execution, the remaining assets are not sufficient to pay all sums, for which the defendant is chargeable, for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.¹⁶²

§ 2213. Simultaneous writs.

While two or more writs, based on the same judgment, cannot be issued to the same county at the same time, in the absence of statutory authority therefor, yet executions on the same judgment may issue to different counties at the same time.¹⁶³ And if a judgment awards not only the delivery of the possession of property but also a sum of money, the money may be collected by virtue of the execution for the delivery of the possession of the property or a separate execution may be issued for the collection of the money, omitting the direction to deliver possession of the property.¹⁶⁴ So where a judgment awards different sums of money, to or against different parties, a separate execution may be issued to collect each sum so awarded; subject to the power of the court to control the enforcement of the execution, on motion, where the collection of one execution will, wholly or partly, satisfy another.¹⁶⁵ This latter provision, according to Mr. Throop, was chiefly intended to provide for judgments in equity causes where different rights are to be enforced, on the part of either the plaintiffs or the defendants. Simultaneous executions against property and against the person are not allowed except by leave of court.¹⁶⁶

¹⁶² Code Civ. Proc. § 1827. For form of undertaking, see Redfield, Pr. Surr. Cts. 1014; 2 Abb. New Pr. & F. 1054.

¹⁶³ Code Civ. Proc. § 1365; *Hammond v. Mather*, 2 Cow. 456.

¹⁶⁴ Code Civ. Proc. § 1373.

¹⁶⁵ Code Civ. Proc. § 1374.

¹⁶⁶ Code Civ. Proc. § 1490.

§ 2214. New execution.

So long as the judgment is unsatisfied, successive executions may be issued to enforce payment of the judgment.¹⁶⁷ When leave of court must first be obtained, because of lapse of time, has already been considered. Where there has been no return to the first writ, a second execution cannot issue to the same county except by leave of court,¹⁶⁸ but the issuance of a second execution before the first is returned merely renders the second execution voidable at the instance of the judgment debtor.¹⁶⁹ It seems that the judgment creditor cannot levy a second execution after he has filed a creditor's bill and obtained the appointment of a receiver,¹⁷⁰ though the mere bringing of a creditor's suit does not, of itself, prevent a sale under an execution issued after the commencement of the suit.¹⁷¹ A second execution may be issued even after supplementary proceedings have been instituted,¹⁷² or after a sale of a third person's property under the first execution where said third person has recovered judgment against plaintiff for selling his goods,¹⁷³ or after the cancellation of a return of the execution as satisfied.¹⁷⁴ So a new execution against property may issue after the escape of the debtor from imprisonment under a body

¹⁶⁷ See *Duryee v. Botsford*, 24 Hun, 317. Section 376 of the Code providing that a final money judgment shall be presumed paid after the lapse of twenty years does not apply to the remedy by execution. *Kincaid v. Richardson*, 25 Hun, 237.

¹⁶⁸ *Cairns v. Smith*, 8 Johns. 260; *Dorland v. Dorland*, 5 Cow. 417; *Horton v. Borthwick*, 15 Wkly. Dig. 309, 27 Hun, 544; *Ledyard v. Burke*, 5 Hill, 571.

¹⁶⁹ *Mollineaux v. Mott*, 78 App. Div. 493, 79 N. Y. Supp. 661; *Horton v. Borthwick*, 27 Hun, 544, 15 Wkly. Dig. 309.

¹⁷⁰ *Gouverneur v. Warner*, 4 Super. Ct. (2 Sandf.) 624; *Rigney v. Tallmadge*, 19 Abb. Pr. 16.

¹⁷¹ *Erickson v. Quinn*, 50 N. Y. 697.

¹⁷² *Smith v. Davis*, 63 Hun, 100, 43 State Rep. 504, 17 N. Y. Supp. 614.

¹⁷³ *Richardson v. McDougall*, 19 Wend. 80. To same effect, *Suydam v. Holden*, Seld. Notes, 170.

¹⁷⁴ *Symonds v. Craw*, 5 Cow. 279; *Van Rensselaer v. Witbeck*, 2 Lans. 498, 503.

execution,¹⁷⁵ or after the death of the debtor while in custody under a body execution,¹⁷⁶ or after the debtor is discharged from custody by the creditor after thirty days' imprisonment under a body execution.¹⁷⁷ So where an evicted execution purchaser has recovered the purchase money from the plaintiff in the execution, the latter may issue a new execution on his judgment.¹⁷⁸ An execution for a part of the judgment, or a direction to levy on an amount less than the whole, precludes a second execution for the balance,¹⁷⁹ though it seems that leave may be given by way of amendment.¹⁸⁰ An undisposed of levy under a previous writ precludes a second writ. The right to issue a second execution as of course, after the return of a previous execution issued within five years of the entry of judgment, partly or wholly unsatisfied or unexecuted, is not limited by the fact that the first execution was a body execution.¹⁸¹ Where execution issued against two joint debtors has been levied upon property of one of them, plaintiff cannot countermand it, and issue a new execution for purpose of levy upon the sole property of the other defendant, especially if it appear that the first execution was withdrawn at request of the debtor upon whose property it was levied, and with the express purpose of screening him from payment of any part of the debt, and collecting the whole from the property of his co-defendant.¹⁸²

The second writ is usually called an alias and writs issued subsequently to the alias are pluries writs. It has been held that it must recite the first and the return of the sheriff thereon,¹⁸³ but the omission to do so is amendable.¹⁸⁴ The designation of the writ as an alias may be rejected as surplusage.¹⁸⁵

¹⁷⁵ Code Civ. Proc. § 1492.

¹⁷⁶ Code Civ. Proc. § 1493.

¹⁷⁷ Code Civ. Proc. § 1494.

¹⁷⁸ Code Civ. Proc. § 1480.

¹⁷⁹ *People v. Onondaga C. P.*, 3 Wend. 331; *Todd v. Botchford*, 13 Wkly. Dig. 222.

¹⁸⁰ *People v. Onondaga C. P.*, 3 Wend. 331.

¹⁸¹ *Quigley v. Baumann*, 29 Misc. 515, 61 N. Y. Supp. 966.

¹⁸² *McChain v. McKeon*, 9 Super. Ct. (2 Duer) 645.

¹⁸³ *Cumpston v. Field*, 3 Wend. 382.

¹⁸⁴ *McMichael v. Knapp*, 7 Cow. 413.

§ 2215. Substitution of copy for lost original.

A new execution may be granted, *nunc pro tunc*, where the old one has been accidentally destroyed.¹⁸⁶ An order of court is necessary, but though a duplicate cannot be regularly issued without an order of the court, such irregularity merely renders the execution voidable so that it can be taken advantage of only by the defendant in the execution.¹⁸⁷

§ 2216. Delivery to officer.

The first step after an execution is prepared is to place it in the hands of the sheriff. It cannot be said to be issued until it is delivered to the sheriff. On delivering the execution to the sheriff,¹⁸⁸ he must, if required, give to the person delivering the same, without compensation, a writing signed by him, specifying the names of the parties, the nature of the execution, and the day and hour of receiving it.¹⁸⁹ The officer must also indorse on the execution the time when received.¹⁹⁰ In addition to the indorsements on the execution, in behalf of the creditor, the attorney who delivers the execution to the sheriff may bind the latter by specific oral directions as to the time and mode of enforcing the writ, though, of course, the power of the sheriff cannot be enlarged.¹⁹¹ The party in whose favor process is issued may give such instructions to the sheriff as will not only excuse him from his general duty but bind him to the performance of what is required of him.¹⁹² But in the absence of proof of special authority to an attorney, his acts in directing the levy on or the taking of

¹⁸⁵ *Jackson v. Sternbergh*, 1 Johns. Cas. 153.

¹⁸⁶ *White v. Lovejoy*, 3 Johns. 448; *Burkle v. Luce*, 1 N. Y. (1 Comst.) 163. Notice of motion must be given. *Douw v. Burt*, 1 Wend. 89.

¹⁸⁷ *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640.

¹⁸⁸ Delivery to deputy sheriff is, in contemplation of law, a delivery to the sheriff. *Burrell v. Hollands*, 78 Hun, 583, 29 N. Y. Supp. 515.

¹⁸⁹ Code Civ. Proc. § 100.

¹⁹⁰ See post, § 2226.

¹⁹¹ *Walters v. Sykes*, 22 Wend. 566; *Gregg v. Murphy*, 73 Hun, 389, 26 N. Y. Supp. 556.

¹⁹² *Gregg v. Murphy*, 73 Hun, 389, 396, 26 N. Y. Supp. 556.

goods on process are in excess of his general powers as an attorney and do not affect or subject his client to liability.¹⁹³ The attorney, as such, has no authority to bind the execution creditor by directing a trespass.¹⁹⁴

If required by the sheriff, the fifty cent fee for receiving the execution, together with the fee for returning the execution, must be paid by the person in whose behalf the execution is issued, at the time when it is delivered to the sheriff, who is not bound to execute it unless the fee is so paid.¹⁹⁵

ART. IV. FORM AND CONTENTS.

§ 2217. General rules as to mandates.

An execution is a mandate of the court, as the word mandate is defined in the Code.¹⁹⁶ The rules as to its teste, subscription, seal, etc., are fixed by sections 22 to 25 of the Code which relate to writs and processes in general.¹⁹⁷

The following rules as to mandates have been laid down in a New York case as deductions drawn from other cases in this state:

1. That where the form of a mandate is prescribed by the Code, it must be substantially followed, otherwise the paper will be jurisdictionally defective and void.
2. But where the substantial rights of the defendant have not been violated, nor the rights of third persons prejudiced, the defect may be disregarded or supplied by amendment.
3. Where the paper purporting to be a mandate recites the necessary jurisdictional facts, the same will not be set aside because of erroneous recitals therein, particularly if the defect is not pointed out in the notice of motion as a ground of vacating.

¹⁹³ *Welsh v. Cochran*, 63 N. Y. 181, 185; *Averill v. Williams*, 4 Denio, 295; *Fischer v. Hetherington*, 11 Misc. 575, 32 N. Y. Supp. 795.

¹⁹⁴ *Clark v. Woodruff*, 83 N. Y. 518; *Wiegmann v. Morimura*, 12 Misc. 37, 33 N. Y. Supp. 39.

¹⁹⁵ Code Civ. Proc. § 3307, subd. 6.

¹⁹⁶ Definition of mandate. Code Civ. Proc. § 3343, subd. 2.

¹⁹⁷ These Code rules are not mandatory. *Park v. Church*, 5 How. Pr. 381, Code R. (N. S.) 47.

4. That sheriffs in an action against them to enforce an alleged liability cannot attack the form of the mandate placed in their hands for enforcement.¹⁹⁸

—**Teste.** An execution issued out of a court of record must be tested, except where it is otherwise expressly prescribed by law, in the name of a judge of the court, on any day.¹⁹⁹ But any mistake or omission in the teste, or in the name of the clerk, unless it was issued by special order of the court, does not render the execution void or even voidable,²⁰⁰ since a mere irregularity which may be amended or disregarded.²⁰¹

—**Subscription.** An execution issued out of a court of record must, before the delivery thereof to an officer to be executed, be subscribed or indorsed with the name of the officer by whom, or by whose direction, it was granted, or the attorney for the party, or the person at whose instance it was issued.²⁰² Notice that an indorsement is equivalent to a subscription.²⁰³ Furthermore, a failure to sign or indorse does not render the execution either void or voidable.²⁰⁴ An execution may be issued in the name of an attorney other than the one by whom judgment was recovered.²⁰⁵ If the execution is based on a docketed justice's judgment, it cannot be signed by attorney, but must be signed by the county clerk.²⁰⁶

¹⁹⁸ *Macdonald v. Keiferdorf*, 22 Civ. Proc. R. (Browne) 105, 18 N. Y. Supp. 763.

¹⁹⁹ Code Civ. Proc. § 23.

²⁰⁰ Code Civ. Proc. § 24.

²⁰¹ *Douglas v. Haberstro*, 88 N. Y. 611. See, also, *Carpenter v. Simmons*, 24 Super. Ct. (1 Rob.) 360, 28 How. Pr. 12.

²⁰² Code Civ. Proc. § 24.

²⁰³ *Heilner v. Walsh*, 47 Super. Ct. (15 J. & S.) 269.

²⁰⁴ Code Civ. Proc. § 24. Amendment may be allowed. *Ovoronhe v. Terry*, 17 Wkly. Dig. 503. So signature by attorney of another state does not render the writ "void." *Hommedieu v. Stowell*, 18 Abb. Pr. 336.

²⁰⁵ *Cook v. Dickerson*, 8 Super. Ct. (1 Duer) 679, 687.

²⁰⁶ *Hill v. Haynes*, 54 N. Y. 153; Code Civ. Proc. § 3043. Compare *Gray v. Lieben*, 8 Civ. Proc. R. (Browne) 48.

— **Seal.** The want of a seal, or a wrong seal, does not render the execution either void or voidable.²⁰⁷

— **Amendments.** Defects in form, not in matter of substance, are amendable. And defects in the execution which are amendable can be taken advantage of only by the defendant in the execution in a direct proceeding to set it aside.²⁰⁸ Thus, the holder of a junior execution cannot take advantage of amendable defects.²⁰⁹ An amendment may, in a proper case, be made even after a return unsatisfied.²¹⁰ Insertion of words added to the judgment is proper.²¹¹ Leave to amend may be conditioned on payment of costs.²¹² A void execution cannot be amended.²¹³ So an unauthorized alteration by an attorney after the return of the writ, will not be sanctioned by the court.²¹⁴

§ 2218. To whom directed.

An execution must be directed to the sheriff unless he is a party or interested, in which case it must be directed to a particular coroner or generally to the coroners of the county. But the court may, in its discretion, order an execution issued on a judgment rendered against a sheriff, either alone or with another, to be directed to a person designated in the order instead of to the coroners, in which case it must be so directed. The person so designated must be of full age, a resident of the state and not a party to the action or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so

²⁰⁷ Code Civ. Proc. § 24. See, also, *Dominick v. Eacker*, 3 Barb. 17.

²⁰⁸ *Wright v. Nostrand*, 94 N. Y. 32, 47, and cases cited.

²⁰⁹ *Abels v. Westervelt*, 15 Abb. Pr. 230, 24 How. Pr. 284.

²¹⁰ *Phelps v. Ball*, 1 Johns. Cas. 31.

²¹¹ *De Lancey v. Piegras*, 73 Hun, 607, 56 State Rep. 835, 26 N. Y. Supp. 806.

²¹² *Porter v. Goodman*, 1 Cow. 413.

²¹³ *Clarke v. Miller*, 18 Barb. 269.

²¹⁴ *People v. Montgomery Common Pleas*, 18 Wend. 633. Compare *Oakley v. Becker*, 2 Cow. 454.

designated exeentes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be collected by virtue of the execution; conditioned for the faithful performance of his duties under the execution. A certified copy of the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.²¹⁵ Clerical mistakes in directing the execution are, however, not ground for setting aside the execution after its return where there is sufficient in the body of the execution to show to what sheriff it was intended to be directed.²¹⁶

§ 2219. To what counties issued.

“An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution for the delivery of the possession of real property must be issued to the county where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel may be issued to any county where the chattel is found, or to the sheriff of the county where the judgment roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties.”²¹⁷

§ 2220. Description of judgment.

An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against

²¹⁵ Code Civ. Proc. § 1362. To whom execution against attached property directed, where term of office of officer making levy has expired, see vol. 2, p. 1537.

²¹⁶ *White v. Coulter*, 59 N. Y. 629.

²¹⁷ Code Civ. Proc. § 1365. That judgment must be docketed before execution can issue, see ante, § 2205.

whom, the time when, and the court in which, the judgment was rendered; and, if it was rendered in the supreme court, the county in which the judgment roll is filed.²¹⁸ A variance between the execution and the judgment does not make the former void,²¹⁹ since an amendment is allowable even after sale to conform it to the judgment.²²⁰ So a description of a judgment by confession, as having been obtained in an action, is not fatal.²²¹ Care should be taken to see that the execution follows the judgment in describing the defendant in the execution;²²² though a mistake is amendable.²²³ Errors in the description of the court where judgment was obtained, and of the place where the judgment roll was filed, are amendable.²²⁴ If all the parties against whom a judgment is rendered are not judgment debtors, the execution must show who is the judgment debtor.²²⁵

— **Judgment of justice of the peace.** Where an execution is issued out of a court, other than that in which the judgment was rendered, upon filing a transcript of the judgment rendered in the latter court, it must also specify the clerk, with

²¹⁸ Code Civ. Proc. § 1366.

²¹⁹ *Jackson v. Walker*, 4 Wend. 462; *Jackson v. Anderson*, 4 Wend. 474; *Jackson v. Page*, 4 Wend. 585.

²²⁰ *Suydam v. McCoon*, *Colem. & C. Cas.* 64.

²²¹ *Healy v. Preston*, 14 How. Pr. 20.

²²² *Reid v. Stegman*, 15 Abb. N. C. 422, 99 N. Y. 646. In order to take property of a person upon execution, he must be correctly described by the judgment and execution. The sheriff can only execute the process against the person or property of the one named therein. It is not enough that the right man is made to pay the debt. *Farnham v. Hildreth*, 32 Barb. 277. An execution issued against executors, merely describing them in their representative capacity, is irregular; such description alone is insufficient to prevent the sheriff from levying upon the individual property of the executors. *Olmsted v. Vredenburgh*, 10 How. Pr. 215.

²²³ *Hilton v. Sinsheimer*, 5 Civ. Proc. R. (Browne) 355; *McIntyre v. Sanford*, 9 Daly, 21.

²²⁴ *Abels v. Westervelt*, 15 Abb. Pr. 230. See, also, *Wright v. Nostrand*, 94 N. Y. 32.

²²⁵ Code Civ. Proc. § 1368. This Code sentence is intended to cover the case where some of the persons against whom the judgment is rendered are merely formal parties.

whom the transcript is filed, and the time of filing; and it must be made returnable to that clerk. If the judgment was rendered in a justice's court, it must specify the justice's name; and it must omit the specification, respecting the filing of the judgment roll.²²⁶ However, the fact that the writ recites that the judgment roll is filed with the county clerk, instead of a transcript, is not fatal.²²⁷

§ 2221. Statement of amount due.

"An execution issued upon a judgment for a sum of money or directing the payment of a sum of money must specify, in the body thereof, the sum recovered or directed to be paid and the sum actually due when it is issued. It may specify a day from which interest upon the sum due is to be computed, in which case the sheriff must collect interest accordingly until the sum is paid."²²⁸ However, a variance between the amount of the judgment and the execution is amendable.²²⁹ An execution is not "void" because issued for too much.²³⁰ An amendment by adding accrued interest inadvertently omitted has been allowed even after the collection and return of the execution.²³¹

§ 2222. Statement as to time judgment was docketed.

The execution must, if the judgment roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county.²³² In

²²⁶ Code Civ. Proc. § 1367.

²²⁷ *Abels v. Westervelt*, 15 Abb. Pr. 230, 24 How. Pr. 284.

²²⁸ Code Civ. Proc. § 1368.

²²⁹ *Wright v. Nostrand*, 94 N. Y. 32, 47; *Holmes v. Williams*, 3 Caines, 98, *Colem. & C. Cas.* 449; *Bissell v. Kip*, 5 Johns. 89; *Swan v. Saddle-mire*, 8 Wend. 676.

²³⁰ *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 451. Especially where sale was for less than amount actually due on judgment. *Peet v. Cowenhoven*, 14 Abb. Pr. 56.

²³¹ *Kokomo Straw Board Co. v. Inman*, 51 State Rep. 12, 21 N. Y. Supp. 705.

²³² Code Civ. Proc. § 1369.

any event, the execution must state that the judgment has been docketed in the county to which the writ issues.²³³

§ 2223. Direction as to property to be taken.

An execution against property must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment out of the personal property of the judgment debtor, and, if sufficient personal property cannot be found, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county or at any time thereafter.²³⁴ The form of the execution where an attachment has been levied, as fixed by section 1370 of the Code, has been set forth in a preceding volume.²³⁵

An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee, must substantially require the sheriff to satisfy the judgment, out of that property.²³⁶ Though a judgment for a specific sum is declared a lien on specific realty, an ordinary execution may be issued.²³⁷

An execution issued under section 1252 of the Code must correctly state the interest which the party issuing the execution is entitled to have sold since the only interest which can be sold under such an execution is the right and title of the judgment debtor at the time of recording and indexing the notice.²³⁸ If the execution is based on a docketed transcript of a justice's judgment or of the municipal court of the city of New York, and the judgment is for less than twenty-five

²³³ If it does not so state, it is fatally defective. *Nanz v. Oakley*, 60 Hun, 431, 39 State Rep. 327, 21 Civ. Proc. R. (Browne) 71, 15 N. Y. Supp. 1.

²³⁴ Code Civ. Proc. § 1369. Chattels real are included. *Laflin v. Relyea*, 7 Paige, 368.

²³⁵ Volume 2, p. 1538.

²³⁶ Code Civ. Proc. § 1371, cited in *Matter of Gough*, 31 App. Div. 307, 52 N. Y. Supp. 627.

²³⁷ *Bennett v. Morehouse*, 42 N. Y. 189.

²³⁸ *Garczynski v. Russell*, 75 Hun, 497, 57 State Rep. 673, 27 N. Y. Supp. 465.

dollars exclusive of costs, the direction to satisfy the judgment out of the real property of the judgment debtor must be omitted.²³⁹ So an execution issued to collect motion costs or money directed to be paid by an "order" must be in the same form, as nearly as may be, as an execution based on a judgment, omitting the recitals and directions relating to real property.²⁴⁰ Plaintiff, holding a judgment against two defendants jointly, recovered in an action for a tort, may issue an execution in the usual form, but in its body commanding the sheriff to collect the judgment from the property of one of the defendants alone; it is not necessary in such cases that the execution shall in its body run against the property of both defendants and be limited to the property of one of them by indorsement only.²⁴¹ An amendment as to the property to be levied on is allowable.²⁴²

§ 2224. Direction as to return.

The execution must be made returnable to the clerk with whom the judgment roll is filed,²⁴³ except that where the execution is based on a docketed transcript of a judgment of a justice of the peace it must be made returnable to the clerk with whom the transcript is filed.²⁴⁴ It must be made returnable within sixty days after the receipt thereof by the sheriff.²⁴⁵ The omission to direct a return within sixty days is, however, a mere irregularity which may be corrected by amendment.²⁴⁶ So where a return is directed, "as required by law," the execution is not fatally defective.²⁴⁷ And an execution which

²³⁹ Code Civ. Proc. § 3043. Greater New York Charter, § 1403.

²⁴⁰ Code Civ. Proc. § 779.

²⁴¹ *Crossitt v. Wiles*, 13 Civ. Proc. R. (Browne) 327.

²⁴² *Lansing v. Lansing*, 18 Johns. 502.

²⁴³ Code Civ. Proc. § 1366.

²⁴⁴ Code Civ. Proc. § 1367.

²⁴⁵ Code Civ. Proc. § 1366. See *Stretter v. Fisher*, 3 How. Pr. 67; *Park v. Church*, 5 How. Pr. 381, Code R. (N. S.) 47.

²⁴⁶ *Benedict & Burnham Mfg. Co. v. Thayer*, 21 Hun, 614. See, also, *Fake v. Edgerton*, 12 Super. Ct. (5 Duer) 681, 3 Abb. Pr. 229.

²⁴⁷ *People v. Seaton*, 25 Hun, 305.

gives unauthorized directions as to its return is amendable.²⁴⁸ An execution may be made returnable in less than twenty days where the parties consent thereto.²⁴⁹

§ 2225. Execution for delivery of property.

“An execution for the delivery of the possession of real property, or a chattel, must particularly describe the property, and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.”²⁵⁰ The second sentence of this Code provision means merely that plaintiff may insert in the writ of possession a mandate to collect any money adjudged to him, and not that it must be so collected nor that it can be collected without the insertion of a mandate to that effect.²⁵¹ Further directions as to the contents of an execution for the delivery of the possession of a chattel and to collect money contingently awarded against the judgment debtor will be found in section 1731 of the Code, which will be considered in a subsequent chapter on actions to recover chattels.

§ 2226. Indorsements.

An “indorsement” signed by plaintiff’s attorney is equivalent to the “subscription” required by the Code.²⁵² If an exe-

²⁴⁸ *Williams v. Hogeboom*, 8 Paige, 469; *Carpenter v. Simmons*, 24 Super. Ct. (1 Rob.) 360, 28 How. Pr. 12.

²⁴⁹ *Jordan v. Posey*, 1 How. Pr. 123, 127.

²⁵⁰ Code Civ. Proc. § 1373.

²⁵¹ *Van Rensselaer v. Wright*, 56 Hun, 39.

²⁵² *Heilner v. Walsh*, 47 Super. Ct. (15 J. & S.) 269.

Art. IV. Form and Contents.—Indorsements.

execution is issued against an executor or administrator, pursuant to leave granted by the surrogate as prescribed by section 1825 of the Code, it must be indorsed with a direction to collect the sum for which the surrogate has permitted execution to issue.²⁵³

— **Name of person issuing execution.** If the judgment creditor has died or the judgment has been assigned, the execution must be indorsed with the name and residence of the person issuing it.²⁵⁴

— **Direction as to property to be taken.** Where an execution against property is issued, upon a judgment recovered for a debt secured wholly or in part by a mortgage, to the county where the mortgaged property is situated, the attorney, or other person who subscribes it, must indorse thereupon a direction to the sheriff not to levy it upon the mortgaged property or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied as the case requires.²⁵⁵

If a part of the judgment debtors are dead, the attorney for the judgment creditor must indorse on the execution a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution out of any property which belonged to him.²⁵⁶

An execution on a judgment against defendants jointly indebted, where all were not served with summons, must be issued, in form, against all the defendants; but the attorney for the judgment creditor must endorse thereon a direction to the sheriff, containing the name of each defendant who was not summoned, and restricting the enforcement of the execu-

²⁵³ Code Civ. Proc. § 1825.

²⁵⁴ Code Civ. Proc. § 1376; *Deyo v. Borley*, 43 State Rep. 638, 18 N. Y. Supp. 300. Where judgment has been assigned it is not sufficient that plaintiff's attorney, the assignee, indorse his name as "plaintiff's attorney." *Duryee v. Botsford*, 24 Hun, 317.

²⁵⁵ Code Civ. Proc. § 1433. Omission to so indorse does not validate a sale of such lands. *Delaplaine v. Hitchcock*, 6 Hill, 14.

²⁵⁶ Code Civ. Proc. § 1383.

tion to the real or personal property of the defendants served, and the personal property of the defendants not served in so far as owned jointly with the other defendants who were summoned, or with any of them.²⁵⁷

— **Time execution received by sheriff.** The sheriff, to whom an execution is directed and delivered, must, upon the receipt thereof, indorse thereupon a memorandum of the day, hour, and minute, when he received it.²⁵⁸ But the writ may be delivered with instructions to the sheriff to indorse it as received at a later date.²⁵⁹

— **Form of execution.**

The People of the State of New York:

To the Sheriff of the County of ———, Greeting:

Whereas, judgment was rendered on the ——— day of ———, 190—, in an action in the ——— court, between ———, plaintiff, and ———, defendant, in favor of the said plaintiff, against the said defendant for the sum of ——— dollars, as appears to us by the judgment roll, filed in the office of the clerk of the county of ———;

And whereas, the said judgment was docketed in the office of the clerk of your county on the ——— day of ———, 190—, and the sum of ——— dollars, is now actually due thereon:

Therefore, we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your county; or if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor at the time when the said judgment was so docketed in the office of the clerk of your county, or at any time thereafter, in whose hands soever the same may be, and return this execution, within sixty days after its receipt by you, to the clerk of the county of ———.

Witness, Hon. ———, one of the ——— of said court at ———, the ——— day of ———, 190—. ²⁶⁰

[Indorsement on back, if any.]

Plaintiff's Attorney.

²⁵⁷ Code Civ. Proc. §§ 1934, 1935. Failure to so indorse may be cured by amendment. *Crane v. Cranitch*, 3 Misc. 557, 23 N. Y. Supp. 320.

²⁵⁸ Code Civ. Proc. § 1363.

²⁵⁹ *Walters v. Sykes*, 22 Wend. 566.

²⁶⁰ If execution is for delivery of property, clause requiring delivery by sheriff must be added.

Art. V. Levy on, and Sale of, Personal Property.

ART. V. LIEN AND LEVY ON, AND SALE OF, PERSONAL PROPERTY.**§ 2227. Scope of article.**

Article two of title two of chapter thirteen of the Code (§§ 1405-1429) relates exclusively to an execution against personal property in so far as the levy, lien, and sale of the property is concerned. There are also some rules relating generally to sales of either real or personal property, in sections 1384 to 1388 of the Code. This article is intended to cover said Code provisions together with other common-law rules relating to the levy on, and sale of, personal property.

§ 2228. When lien created.

“The goods and chattels of a judgment debtor not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property which is expressly declared by law to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before.”²⁶¹ Now it will be noticed that an execution is a lien from the time of its delivery only against property subject to execution²⁶² and situated within the jurisdiction of the officer, i. e., the county.²⁶³ Furthermore, the writ must be issued with the actual intent to be executed,²⁶⁴ and an actual levy must be made during the life of the execution.²⁶⁵ Leaving the writ at the place of business of a deputy sheriff is insufficient as a delivery so as to

²⁶¹ Code Civ. Proc. § 1405; *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999.

²⁶² *Allen v. Anderson*, 39 Hun, 514; *Sickles v. Sullivan*, 22 Civ. Proc. R. (Browne) 322, 47 State Rep. 82, 19 N. Y. Supp. 749.

²⁶³ *Matter of Gies Lithographic Co.*, 7 App. Div. 550, 74 State Rep. 704, 40 N. Y. Supp. 146.

²⁶⁴ No lien is acquired where there is a command not to levy until further orders. *Smith v. Erwin*, 77 N. Y. 466.

²⁶⁵ *Allen v. Anderson*, 39 Hun, 514; *Matter of Muehlfield & Haynes Piano Co.*, 12 App. Div. 492, 76 State Rep. 802, 42 N. Y. Supp. 802.

have it take effect from the time it is left.²⁶⁶ Until a levy, however, the sheriff cannot maintain trover.²⁶⁷ The lien dates from the delivery of the writ whether in or out of office hours.²⁶⁸ Of course the delivery, in order to create a lien, must be preceded by a docketing of the judgment in the county to which the writ issues.²⁶⁹

It follows that if a lien is created by the delivery of the execution to be executed, such lien is not lost by a subsequent assignment for benefit of creditors,²⁷⁰ nor by the levy of a tax warrant,²⁷¹ nor by the giving of a chattel mortgage which is not filed until after the issuance of the writ,²⁷² nor by a sale under a fraudulent chattel mortgage,²⁷³ nor by the appointment of a receiver.²⁷⁴ But actual possession of the property by a receiver precludes the sale, without leave of court, even though the levy was made before the appointment of the receiver,²⁷⁵ though a sale while the property is in the possession of the sheriff pursuant to a levy made before the appointment of the receiver is not, at any event, void, but merely irregular.²⁷⁶

²⁶⁶ *Burrell v. Hollands*, 78 Hun, 583, 61 State Rep. 373, 29 N. Y. Supp. 515.

²⁶⁷ *Hotchkiss v. McVickar*, 12 Johns. 403; *Marsh v. Lawrence*, 4 Cow. 461, 466.

²⁶⁸ *Frances v. Hamilton*, 26 How. Pr. 180.

²⁶⁹ *Stoutenburgh v. Vandenburg*, 7 How. Pr. 229.

²⁷⁰ *MacDonald v. Moore*, 1 Abb. N. C. 53. See *Robertson v. Lawton*, 91 Hun, 67, 36 N. Y. Supp. 175. If assignee is in possession, the execution is not a lien. *Wheeler v. Lawson*, 103 N. Y. 40.

²⁷¹ *Fuller v. Allen*, 7 Abb. Pr. 12, 16 How. Pr. 247.

²⁷² *Hale v. Sweet*, 40 N. Y. 97.

²⁷³ *Guilford v. Mills*, 44 State Rep. 358, 18 N. Y. Supp. 275.

²⁷⁴ *Walling v. Miller*, 108 N. Y. 173; *Sickles v. Sullivan*, 22 Civ. Proc. R. (Browne) 322, 47 State Rep. 82, 19 N. Y. Supp. 749; *Matter of Gies Lithographic Co.*, 7 App. Div. 550, 74 State Rep. 704, 40 N. Y. Supp. 146; *Gorman v. Finn*, 56 App. Div. 155, 158, 67 N. Y. Supp. 546. Levy on property of corporation after petition for its voluntary dissolution but before the appointment of a receiver is sufficient to hold the property. *Matter of Muehlfeld & Haynes Piano Co.*, 12 App. Div. 492, 76 State Rep. 802, 42 N. Y. Supp. 802; *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999.

²⁷⁵ *Walling v. Miller*, 108 N. Y. 173.

²⁷⁶ *Varnum v. Hart*, 119 N. Y. 101, 108.

— **As against bona fide purchasers.** The title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer, to be executed.²⁷⁷ A purchaser, though in good faith, “after the levy,” takes subject thereto.²⁷⁸ The purchaser in good faith of chattels who is protected against an outstanding execution until a levy thereunder, is one who has parted with fresh consideration, and a creditor who takes title to goods as payment of, or a chattel mortgage upon such property as security for, an antecedent indebtedness, without surrendering anything, is not protected.²⁷⁹ But one who takes a chattel mortgage to secure a loan made partly at the time and partly before it, without notice of a debt owing by the mortgagor, and files his mortgage, and at the expiration of a year, instead of renewing it, takes a new one, is a bona fide mortgagee, and has a valid lien, as against the judgment creditor of the mortgagor on the indebtedness aforesaid, notwithstanding an execution thereon is in the sheriff’s hands at the time of the execution and delivery of the new mortgage.²⁸⁰ The burden of showing a person to be a purchaser in good faith is on him.²⁸¹ A levy will not be presumed to defeat a sale by the debtor made soon after the execution was placed in the sheriff’s hands.²⁸²

§ 2229. Priorities between executions.

Assuming that executions have been properly issued, i. e., that the judgments on which they are based have been duly

²⁷⁷ Code Civ. Proc. § 1409; *Ray v. Birdseye*, 5 Denio, 619; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Butler v. Maynard*, 11 Wend. 548; *Thompson v. Van Vechten*, 5 Abb. Pr. 458. Delivery to purchaser as necessary to pass title. *Schoonmaker v. Vervalen*, 9 Hun, 138.

²⁷⁸ *Butler v. Maynard*, 11 Wend. 548.

²⁷⁹ *Ray v. Birdseye*, 5 Denio, 619; *Warner v. Paine*, 3 Barb. Ch. 630; *Chapman v. O’Brien*, 34 Super. Ct. (2 J. & S.) 524; *Osborn v. Alexander*, 40 Hun, 323.

²⁸⁰ *Walker v. Henry*, 85 N. Y. 130.

²⁸¹ *Williams v. Shelly*, 37 N. Y. 375.

²⁸² *Millsbaugh v. Mitchell*, 8 Barb. 333.

entered and docketed and the roll filed, the Code provides for priorities between executions as follows: "Where two or more executions against property are issued, out of the same or different courts of record, against the same judgment debtor, the one first delivered to an officer to be executed has preference, notwithstanding that a levy is first made by virtue of an execution subsequently delivered; but if a levy upon and sale of personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the latter."²⁸³ "But an execution issued out of a court not of record, or a warrant of attachment granted in an action pending in a court not of record, if actually levied, has preference over another execution issued out of any court of record, or not of record, which has not been previously levied."²⁸⁴ In short, where executions are issued out of a court of record, the time of the respective deliveries, rather than the time of levy, fixes the priority between executions,²⁸⁵ and if an actual levy is not made under the one first delivered before a sale of goods under the other, the proceeds must be first applied to the prior execution notwithstanding the Code forbids a levy or sale by virtue thereof.²⁸⁶ Priorities may, however, be decided by agreement.²⁸⁷ If executions are delivered at the same time, the moneys should be equally divided until the smaller execution is satisfied.²⁸⁸ If executions are issued both on judgments against a firm and on judgments against a member of the firm, against partnership property, the former are entitled to priority out of the proceeds.²⁸⁹

²⁸³ Code Civ. Proc. § 1406.

²⁸⁴ Code Civ. Proc. § 1408. Levy cannot be made by constable while property is in hands of sheriff. *Seymour v. Newton*, 17 Hun, 30, 32, and cases cited.

²⁸⁵ *Lambert v. Paulding*, 18 Johns, 311; *Van Camp v. Searle*, 79 Hun, 134, 24 Civ. Proc. R. (Scott) 16, 61 State Rep. 349, 29 N. Y. Supp. 757.

²⁸⁶ *Bach v. Gilbert*, 124 N. Y. 612, 620.

²⁸⁷ *First Nat. Bank of Rome v. Dering*, 8 Wkly. Dig. 261.

²⁸⁸ *Campbell v. Ruger*, 1 Cow. 215.

²⁸⁹ *Ryder v. Gilbert*, 16 Hun, 163; *Dunham v. Murdock*, 2 Wend. 553. The case of *Fenton v. Folger*, 21 Wend. 676, is overruled.

— **Dormant executions.** An execution is said to be dormant where delivered to the sheriff with instructions not to levy or where, after levy, the sheriff is instructed not to proceed further, so that it can fairly be inferred that the debtor is to be left in possession or that the execution is to be used merely as a security.²⁹⁰ In other words, any direction to the sheriff which suspends the lien or delays the enforcement of the levy, leaving the property in the hands of the judgment debtor, postpones the execution in favor of a subsequent one delivered to the sheriff without reservation,²⁹¹ unless a notice to proceed is given by the creditor before any other execution is received;²⁹² and where an execution is dormant as against other creditors, it is also dormant as to bona fide purchasers.²⁹³ But mere acquiescence in, without encouragement or sanction of, the sheriff's delay, does not render an execution dormant.²⁹⁴ There must be some fault on the part of the party issuing the execution. It must appear that the plaintiff or his attorney was responsible for the delay by giving instructions to the officer not to proceed in the collection of the execution,²⁹⁵ though it is not necessary that the creditor has acted in bad faith or with an intent to defraud.²⁹⁶ An unreasonable delay directed by the plaintiff in the execution, though from motives of

²⁹⁰ Execution is fraudulent where issued merely to prevent a disposition of the property. *Ball v. Shell*, 21 Wend. 222. Execution is dormant where delivered not to be executed. *Robertson v. Lawton*, 91 Hun, 67, 36 N. Y. Supp. 175.

²⁹¹ *Excelsior Needle Co. v. Globe Cycle Works*, 48 App. Div. 304, 62 N. Y. Supp. 538.

²⁹² *Miller v. Kosch*, 74 Hun, 50, 26 N. Y. Supp. 183.

²⁹³ *Sage v. Woodin*, 66 N. Y. 578, 584; *Thompson v. Van Vechten*, 5 Abb. Pr. 458.

²⁹⁴ *Herkimer County Bank v. Brown*, 6 Hill, 232; *Thompson v. Van Vechten*, 5 Abb. Pr. 458; *Russell v. Gibbs*, 5 Cow. 390; *Doty v. Turner*, 8 Johns. 16.

²⁹⁵ *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999; *Childs v. Latham*, 38 State Rep. 852, 14 N. Y. Supp. 507. An execution is dormant only while the sheriff holds it not to be executed, and is revived by notice to execute it. *Miller v. Kosch*, 74 Hun, 50, 56 State Rep. 162, 26 N. Y. Supp. 183.

²⁹⁶ *Sage v. Woodin*, 66 N. Y. 578; *Hicok v. Coates*, 2 Wend. 419.

humanity, will give precedence to a subsequent execution,²⁹⁷ though it has been held that an execution is not dormant where the sale is ordered postponed to prevent a sacrifice of the property.²⁹⁸ It is immaterial that the creditor instructs the sheriff, after directing a delay, "by no means to let their execution lose its preference."²⁹⁹ Only another creditor, or a bona fide purchaser, can object that an execution has become dormant.³⁰⁰ The rule that an execution is deemed fraudulent and void as against a subsequent execution, where the creditor allows the goods to remain in the debtor's possession, does not apply where all the possession is taken of which the chattel is susceptible, e. g., where a growing crop is levied upon and sale delayed until harvest.³⁰¹ The rule as to dormant executions does not apply to real estate, the lien on which depends on the docketing of the judgment and not on the delivery of executions or the levy.³⁰² If a sale is made under a dormant execution it is valid and the purchaser receives a good title. The remedy of the junior creditors is to move to have the proceeds of the sale applied to the junior writs.³⁰³

§ 2230. Priorities between execution and attachment.

The priority between an execution and an attachment has been stated in a preceding volume.³⁰⁴

§ 2231. Property subject to levy.

In the chapter on attachments there has been enumerated the articles of personal property which are exempt from levy

²⁹⁷ *Sage v. Woodin*, 66 N. Y. 578, 584; *Excelsior Needle Co. v. Globe Cycle Works*, 48 App. Div. 304, 310, 62 N. Y. Supp. 538.

²⁹⁸ *Power v. Van Buren*, 7 Cow. 560.

²⁹⁹ *Kellogg v. Griffin*, 17 Johns. 274.

³⁰⁰ *Ferguson v. Lee*, 9 Wend. 258. See, also, *Beals v. Allen*, 18 Johns. 363.

³⁰¹ *Whipple v. Foot*, 2 Johns. 418.

³⁰² *Muir v. Leitch*, 7 Barb. 341; *McIntyre v. Sanford*, 9 Wkly. Dig. 277, 9 Daly, 21.

³⁰³ *Richards v. Allen*, 3 E. D. Smith, 399.

³⁰⁴ Volume 2, p. 1484.

either by virtue of an attachment or an execution.³⁰⁵ Irrespective of such statutes which expressly provide for immunity from levy and sale in certain cases, some classes of property are not subject to a levy on execution, either from the nature of the property or interest itself, or on grounds of public policy. These will be considered in this connection. It will not be necessary to consider what is personal property further than to state that growing crops which are the annual products of the land are personal property,³⁰⁶ while grass and other natural products of the land are, before severance, real property which cannot be levied on.³⁰⁷ Rolling stock of a railroad company may be levied on as personal property.³⁰⁸ Public property, such as property of a municipal corporation, cannot be sold.³⁰⁹ In an attachment suit against a nonresident not personally served, an execution can issue only against the property attached.³¹⁰ Goods replevied by a third person, after levy, cannot be levied on again under second execution as defendant's property though he has been permitted to possess them.³¹¹ A servant holding property for the owner during the pleasure of the latter has no leviable interest.³¹²

An equitable interest in personal property, such as the buyer's interest in goods sold under a conditional sale, is not subject to execution.³¹³ He has no leviable interest until per-

³⁰⁵ Volume 2, pp. 1415-1425.

³⁰⁶ *Whipple v. Foot*, 2 Johns. 418; *Shepard v. Philbrick*, 2 Denio, 174. Lessee's interest in growing crops is leviable (*Stewart v. Doughty*, 9 Johns. 108), though, under an agreement to work on shares, it was held that, before complete performance, the lessee had no leviable interest in the farm products. *Schroeppel v. Dingman*, 17 Wkly. Dig. 257.

³⁰⁷ *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

³⁰⁸ *Stevens v. Buffalo & N. Y. C. R. Co.*, 31 Barb. 590; *Beardsley v. Ontario Bank*, 31 Barb. 619; *Bement v. Plattsburgh & M. R. Co.*, 47 Barb. 104.

³⁰⁹ *Brinckerhoff v. Board of Education*, 6 Abb. Pr. (N. S.) 428, 37 How. Pr. 499, 2 Daly, 443; *Leonard v. City of Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80, with note; affirming judgment 7 Hun. 73.

³¹⁰ *Grevell v. Whiteman*, 32 Misc. 279, 65 N. Y. Supp. 974.

³¹¹ *Acker v. White*, 25 Wend. 614.

³¹² *Masten v. Webb*, 60 How. Pr. 302.

³¹³ *Friedman v. Phillips*, 84 App. Div. 179, 82 N. Y. Supp. 96; *Burchell*

formance of the condition.³¹⁴ But if the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the claimant, the goods are liable to levy.³¹⁵

If a warrant of attachment has been levied, and service of the summons was other than personal, only the personal property attached can be reached.³¹⁶

—**Money.** The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor.³¹⁷ Bank bills may be levied on.³¹⁸ But money deposited in a bank cannot be levied on,³¹⁹ the theory being that where the money is commingled with other money there is no specific property to be levied on. Money collected by a sheriff under an execution cannot, while it remains in his hands, be levied on by him under an execution against the creditor;³²⁰ but where, after sale of defendant's goods on process against him, there is a surplus, the money belongs to defendant and may be levied on.³²¹

—**Choses in action.** In the absence of a permissive statute, choses in action are not subject to levy. The Code provides as follows: "The officer to whom an execution against property is delivered must levy upon and sell a bill or other

v. Green, 6 Misc. 236, 27 N. Y. Supp. 82. Compare *Savall v. Waufol*, 21 Civ. Proc. R. (Browne) 18, 16 N. Y. Supp. 219.

³¹⁴ *Strong v. Taylor*, 2 Hill, 326; *Herring v. Hoppock*, 15 N. Y. 409; *Hasbrouck v. Bouton*, 60 Barb. 413.

³¹⁵ *Bonesteel v. Flack*, 41 Barb. 435, 27 How. Pr. 310.

³¹⁶ Code Civ. Proc. § 1370. See volume 2, p. 1537.

³¹⁷ Code Civ. Proc. § 1410. Levy on money deposited in lieu of bail. *McShane v. Pinkham*, 46 State Rep. 65, 22 Civ. Proc. R. (Browne) 173, 19 N. Y. Supp. 969.

³¹⁸ *Handy v. Dobbin*, 12 Johns. 220; *Holmes v. Nuncaster*, 12 Johns. 395.

³¹⁹ *Carroll v. Cone*, 40 Barb. 220; *Duffy v. Dawson*, 2 Misc. 401, 50 State Rep. 584, 21 N. Y. Supp. 978.

³²⁰ *Muscott v. Woolworth*, 14 How. Pr. 477; *Baker v. Kenworthy*, 41 N. Y. 215; *Carroll v. Cone*, 40 Barb. 220; *First Nat. Bank of Oswego v. Dunn*, 97 N. Y. 149; *Adams v. Welsh*, 43 Super. Ct. (11 J. & S.) 52.

³²¹ *Wheeler v. Smith*, 11 Barb. 345.

evidence of debt belonging to the judgment debtor, which was issued by a moneyed corporation to circulate as money; or a bond or other instrument for the payment of money, belonging to the judgment debtor, which was executed and issued, by a government, state, county, public officer, or municipal or other corporation, and is in terms negotiable, or payable to the bearer, or holder."³²² Undelivered bonds of a corporation cannot be levied on,³²³ nor can a liquor tax certificate or a surrender receipt therefor.³²⁴ Choses in action not enumerated in the Code section cannot be levied on. Hence a promissory note cannot be levied on³²⁵ unless by consent of the judgment debtor.³²⁶ So shares of stock cannot be levied on except where expressly allowed by statute.³²⁷

—**Trade-mark.** A trade-mark cannot be levied on as a species of tangible property, apart from the article it has served to identify, unless under authority of statute.³²⁸

—**Wages, debts, income from trust funds, or profits.** Section 1391 of the Code which relates to exemptions of personal property was amended by Laws 1903, c. 461, and further amended by Laws 1905, c. 175, by adding the following provision:

"Where a judgment has been recovered wholly for necessities sold, or work performed in a family as a domestic, or for services rendered for salary owing to an employe of the judgment debtor, and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall there-

³²² Code Civ. Proc. § 1411. Attachment of choses in action, see vol. 2, p. 1408.

³²³ *Sickles v. Richardson*, 23 Hun, 559.

³²⁴ Not an "evidence of debt." *McNeeley v. Welz*, 166 N. Y. 124.

³²⁵ *Ingalls v. Lord*, 1 Cow. 240; *Ransom v. Miner*, 5 Super. Ct. (3 Sandf.) 692, Code R. (N. S.) 98.

³²⁶ *People v. National Mut. Ins. Co.*, 19 App. Div. 247, 46 N. Y. Supp. 102.

³²⁷ *Denton v. Livingston*, 9 Johns. 96.

³²⁸ *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 20 N. Y. Supp. 462; judgment reversed 39 State Rep. 488, 15 N. Y. Supp. 249, which is reversed in 135 N. Y. 24.

after become due and owing to him, to an amount exceeding twelve dollars per week, and where no execution issued as herein provided in this section is unsatisfied and outstanding against said judgment debtor, the judgment creditor may apply to the court in which said judgment was recovered, or the court having jurisdiction of the same without notice to the judgment debtor, and, upon satisfactory proof of such facts by affidavit or otherwise, the court if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection, to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor, to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided. It shall be the duty of any person or corporation to whom said execution shall be presented and who shall at such time be indebted to the judgment debtor named in such execution or who shall become indebted to such judgment debtor in the future and while said execution shall remain a lien upon said indebtedness, to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until such execution shall be wholly satisfied, and such payment shall be a bar to any action therefor by such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail or refuse to pay over to said officer presenting said execution the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied toward the payment of said execution. Either party may apply at any time to the

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court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge to any justice of the city court, upon such notice to the other party as such court, judge, or justice shall direct, for a modification of said execution, and upon such a hearing, the said court, judge or justice may make such modification of the said execution as shall be deemed best, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided.^{328a}

This amendment provides a mode of legal procedure by which a judgment may be collected out of wages of the judgment debtor by special form of execution, and limits the scope of the remedy of the judgment creditor through that process. The statute does not take away nor impair any vested right of the judgment debtor. The operation of the statute should, therefore, not be confined merely to judgments recovered after it took effect.³²⁹ Notice that an execution against the wages, debts, earnings, and salary may issue only “where no execution issued as hereafter provided in this section is unsatisfied and outstanding against said judgment debtor.” By this heretofore unknown process a sum no greater than ten per centum of the earnings of the judgment debtor can be taken toward the satisfaction of the judgment upon which the execution was issued, and to prevent the taking of a larger sum it is distinctly provided that such execution may not issue where there is another outstanding and unsatisfied.³³⁰ An affidavit stating that “there is now no execution on this judgment now outstanding or not returned” is not sufficient since it fails to show that there are not executions on other judgments outstanding and unsatisfied.^{330a} A judgment obtained in an action on a judgment for necessities is not one recovered for necessities.^{330b} This Code amendment was held not to authorize an

^{328a} Statute is not retroactive. *King v. Irving*, 92 N. Y. Supp. 1094.

³²⁹ *Meyer v. Halberstadt*, 44 Misc. 408, 89 N. Y. Supp. 1019.

³³⁰ *Rosenstock v. City of New York*, 97 App. Div. 337, 89 N. Y. Supp. 948.

^{330a 330b} *Neuman v. Mortimer*, 98 App. Div. 64, 90 N. Y. Supp. 524.

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execution which could be collected from a “municipal” corporation,³³¹ but it was amended in 1905 so as to apply thereto. The order should not direct a trustee to pay ten per cent of the income of a trust where he is not a party to the motion.^{331a} A decision that notice of the application must be given to the judgment debtor is overruled by the 1905 amendment.

— Form of affidavit under section 1391.

[Title of cause and court.]

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That judgment was rendered in the above-entitled action in the ——— court, on the ——— day of ———, 190—, in favor of ———, plaintiff, against ———, defendant, for the sum of ———, for necessities sold [or “work performed in a family as a domestic” or “services rendered for salary owing to ——— as an employer of the defendant”].

III. That an execution against property was issued on said judgment to the sheriff of ——— county on the ——— day of ———, 190—.

IV. That said execution has been returned wholly unsatisfied [if partly unsatisfied, so state, and show amount remaining due].

V. That ——— is employed by ———, who resides at No. ——— street in the city of ———, and whose place of business is at ———, at a weekly salary of ——— dollars [or state the facts to show that any wages, debts, earnings, salary, income from trust funds, or profits, are due and owing to the defendant or will thereafter become due and owing to him, to an amount exceeding twelve dollars a week].

VI. That no execution issued on any judgment pursuant to section 1391 of the Code of Civil Procedure against the wages, debts, earnings, salary, income from trust funds, or profits, of said defendant, is unsatisfied or outstanding.

[Jurat.]

[Signature.]

— Form of order.

[Title of cause and court.]

[Venue.]

On reading and filing the affidavit of ———, verified on the ——— day of ———, 190—, showing [state briefly the facts set forth in the affidavit]; now, on motion of ———, attorney for ———:

Ordered, that an execution issue for the sum of ——— dollars, against

³³¹ Emes v. Fowler, 43 Misc. 603, 89 N. Y. Supp. 685; Rosenstock v. City of New York, 101 App. Div. 9, 91 N. Y. Supp. 737.

^{331a} King v. Irving, 92 N. Y. Supp. 1094.

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ten per cent. of the wages, debts, earnings, salary, income from trust funds, and profits due or to become due to said ———, the judgment debtor herein [from ———], as provided for by section 1391 of the Code of Civil Procedure.

[Date.]

[Signature of judge with initials of title.]

— **Form of execution under section 1391.**

The People of the State of New York:

To the Sheriff of ——— County, Greeting:

Whereas, judgment was rendered on the ——— day of ———, 190—, in an action in the ——— court, between ———, plaintiff, and ———, defendant, on a cause of action for necessities sold [or other cause of action, mentioned in section 1391 of Code], in favor of the said plaintiff, against the said defendant, for the sum of ——— dollars, as appears to us by the judgment roll filed in the office of the clerk of the county of ———.

And whereas, an execution issued on said judgment on the ——— day of ———, 190—, has been returned wholly unsatisfied, and thereafter an order was made by the Hon. ———, justice of the ——— court, on the ——— day of ———, 190—, under section 1391 of the Code of Civil Procedure, directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits, due or to become due to the said judgment debtor, for the sum of ——— dollars, which is now actually due thereon:

Therefore, we command you that you satisfy the said judgment, to the amount of ——— dollars, out of ten per cent. of the wages, debts, earnings, salary, income from trust funds, or profits, now due or to become due to ———, the said judgment debtor, and return this execution, within sixty days after its receipt by you, to the clerk of ——— county.

Witness, Hon. ———, one of the ——— of said court, at ———, the ——— day of ———, 190—.

_____,
Plaintiff's attorney.

[Endorse with direction as to property to be reached].

— **Interest of pledgor.** Property in pledge could not, at common law, be levied on under an execution against the pledgor. The Code provides as follows: “The interest of the judgment debtor in personal property, subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions, upon which the judg-

ment debtor could obtain possession thereof. This section does not apply to property of which the judgment debtor is unconditionally entitled to the possession.³³² The lien attaches to the surplus where the execution debtor has pledged goods and the pledgee has sold them.³³³

— **Interest of lessee.** The interest of a lessee for a specified term is leviable,³³⁴ notwithstanding a provision in the lease giving the lessor a lien on all personal property which may be put on the premises.³³⁵ The interest of a lessee for a term of years is a chattel real to which the lien of a judgment attaches, and may be sold under execution; but where at the time of the sale the unexpired term is less than three years, such interest must be sold as personal property.³³⁶ Of course if the interest of the lessee is forfeited it cannot be levied on.³³⁷

— **Interest of licensee.** One having a chattel for a certain time for a particular use and no other, and prohibited from selling or loaning it, has merely a personal license to use the chattel, and his interest cannot be levied on.³³⁸

— **Interest of chattel mortgagor.** At common law, personal property which was mortgaged could not be taken on an execution against the mortgagor,³³⁹ unless the mortgage was fraudulent as to creditors.³⁴⁰ But now if the mortgagor's interest is a legal one, i. e., if he has the right to retain possession for a definite time or until default, it may be levied on,³⁴¹ provided the levy is made before default³⁴² and before

³³² Code Civ. Proc. § 1412. See *Bakewell v. Ellsworth*, 6 Hill, 484.

³³³ *Sickles v. Sullivan*, 22 Civ. Proc. R. (Browne) 322, 47 State Rep. 82, 19 N. Y. Supp. 749.

³³⁴ *Van Antwerp v. Newman*, 2 Cow. 543; *Otis v. Wood*, 3 Wend. 498; *Evertsen v. Sawyer*, 2 Wend. 507.

³³⁵ *Buskirk v. Cleveland*, 41 Barb. 610.

³³⁶ *O'Rourke v. Henry Prouse Cooper Co.*, 11 Civ. Proc. R. (Browne) 321, 3 State Rep. 552.

³³⁷ *Otis v. Wood*, 3 Wend. 498.

³³⁸ *Reinmiller v. Skidmore*, 7 Lans. 161.

³³⁹ *Mattison v. Baucus*, 1 N. Y. (1 Comst.) 295.

³⁴⁰ *Randall v. Cook*, 17 Wend. 53.

³⁴¹ *Bailey v. Burton*, 8 Wend. 339; *Hull v. Carnley*, 11 N. Y. (1 Kern.) 501; *Manning v. Monaghan*, 28 N. Y. 585; *Smith v. Beattie*, 31 N. Y. 542; *Fowler v. Haynes*, 14 Wkly. Dig. 376. The clause allowing the

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surrender of possession to the mortgagee.³⁴³ A bill of sale, having the character of a mortgage, gives the seller a special interest subject to levy.³⁴⁴

— **Interest of mortgagee.** The chattels may be levied on as the property of the mortgagee after default, though he has not taken possession.³⁴⁵

§ 2232. Joint property including partnership property.

Joint property may be sold on an execution against one of the owners.³⁴⁶ The execution may be satisfied out of either the joint or the separate property.³⁴⁷ The interest of a partner in firm goods may be levied on, pursuant to an execution against him, by taking possession of the entire property,³⁴⁸ but the sale must be subject to the claim of the other partners.³⁴⁹ An execution on a judgment against a partnership may be satisfied out of the partnership property or out of the separate property of each debtor.³⁵⁰

Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as prescribed in sections 693 and 694 of the Code, a levy, by virtue of

mortgagee, in case he deems himself unsafe, to take possession and sell, renders the interest of the mortgagor not subject to levy. *Farrell v. Hildreth*, 38 Barb. 178; *Bryan v. Smith*, 13 Daly, 331.

³⁴² *Galen v. Brown*, 22 N. Y. 37; *Hall v. Sampson*, 35 N. Y. 274; *Leadbetter v. Leadbetter*, 125 N. Y. 290.

³⁴³ *Powers v. Elias*, 53 Super. Ct. (21 J. & S.) 480.

³⁴⁴ *Michelson v. Fowler*, 27 Hun, 159.

³⁴⁵ *Ferguson v. Lee*, 9 Wend. 258.

³⁴⁶ *Beach v. Hollister*, 5 T. & C. 568, 3 Hun, 519; *Kaufman v. Schoeffel*, 46 Hun, 571, 12 State Rep. 695. See Code Civ. Proc. §§ 1934, 1935. Attachment, see vol. 2, p. 1407.

³⁴⁷ *Godfrey v. Gibbons*, 22 Wend. 569; *Cassidy v. United States Reflector Co.*, 5 Month. Law Bul. 54; *Saunders v. Reilly*, 105 N. Y. 12; *Flanders v. Batten*, 50 Hun, 542, 20 State Rep. 671, 3 N. Y. Supp. 728.

³⁴⁸ *Kaufman v. Schoeffel*, 46 Hun, 571, 576, 12 State Rep. 695.

³⁴⁹ *Wheeler v. McFarland*, 10 Wend. 318. Attachment, see vol. 2, p. 1407.

³⁵⁰ *Saunders v. Reilly*, 105 N. Y. 12, 21; followed in *Davis v. Delaware & H. Canal Co.*, 109 N. Y. 47.

an execution against his individual property, cannot be made upon his interest in the same property, unless the warrant of attachment has been vacated or annulled.³⁵¹

§ 2233. Levy.

The levy of the execution is the formal act required by the statute to place the personal property of the judgment debtor, against which the writ is directed, in the possession or control of the officer, either actually or constructively. A lien on the personal property of the debtor having been created by the delivery of an execution to the sheriff, the question arises as to what further steps are necessary to make this lien effective. Early cases held that the common-law right of the sheriff to sell without actual levy remains as against the judgment debtor, when no title of a bona fide purchaser intervenes or is set up,³⁵² but the rule now is that the execution does not bind chattels, as against other creditors, without an actual levy during the life of the execution.³⁵³ In short, there can be no valid sale without a levy.³⁵⁴

— **Time.** A levy cannot be made after the return day has passed,³⁵⁵ but the sheriff can, where a levy has been made, sell the property after the return day.³⁵⁶ A levy cannot be made on Sunday nor before the filing, within business hours, of the judgment on which the writ issued.³⁵⁷

— **Sufficiency.** The Code is silent as to what must be done

³⁵¹ Code Civ. Proc. § 1415. When warrant is "annulled," see Code Civ. Proc. § 3343, subd. 12, and vol. 2, p. 1529.

³⁵² Roth v. Wells, 29 N. Y. 491; Bond v. Willett, 31 N. Y. 102.

³⁵³ Hathaway v. Howell, 54 N. Y. 97. No constructive levy is presumed on the delivery of the writ to the sheriff. Walker v. Henry, 85 N. Y. 130. Mere demand for payment is insufficient. Abeel v. Anderson, 39 Hun, 514.

³⁵⁴ Stonebridge v. Perkins, 141 N. Y. 1.

³⁵⁵ Hathaway v. Howell, 54 N. Y. 112; Walker v. Henry, 85 N. Y. 135; Smith v. Smith, 60 N. Y. 161; Matter of Pond, 21 Misc. 114, 46 N. Y. Supp. 999.

³⁵⁶ Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 511; Matter of Pond, 21 Misc. 114, 116, 46 N. Y. Supp. 999.

³⁵⁷ Hathaway v. Howell, 54 N. Y. 97.

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to constitute a levy on personal property and hence the common-law rules govern. The levy may be sufficient against the defendant in the execution but insufficient as to third persons. It has been held that the validity of a levy, as against a bona fide purchaser or a junior creditor, depends on the circumstances in each case.³⁵⁸ The test of a valid levy is said to be whether the officer's act would subject him to an action of trespass, if unprotected by the execution.³⁵⁹ In the early case of *Bond v. Willett*, 31 N. Y. 102, the rule is laid down that to constitute a valid levy, even against a subsequent bona fide purchaser from the debtor, it is sufficient that (1) the property is in the view and under the control of the officer;³⁶⁰ (2) that he takes possession of it, either by removing it or by an oral declaration that a levy is intended, and that he claims to hold the goods under such levy;³⁶¹ (3) that an inventory, or at least, a memorandum of the levy, is made at the time.³⁶² The sheriff need not, however, remove the goods from the debtor's cus-

³⁵⁸ *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999.

³⁵⁹ *Roth v. Wells*, 29 N. Y. 471; *Caruana v. Cohn*, 5 Wkly. Dig. 78; *Powers v. Elias*, 53 Super. Ct. (21 J. & S.) 480.

³⁶⁰ Merely seizing a few articles outside a store and proclaiming a levy on the goods locked up in it, where not within view, is insufficient. *Haggerty v. Wilber*, 16 Johns. 287. Where part of the articles on a farm were hidden from view by an intervening hill, there was no levy as against a subsequent purchaser without notice, though included in the inventory. *Van Wyck v. Pine*, 2 Hill, 666.

³⁶¹ *Beekman v. Lansing*, 3 Wend. 446; *Ray v. Harcourt*, 19 Wend. 495; followed in *Van Wyck v. Pine*, 2 Hill, 666. However, a manual interference with the goods is unnecessary. *Barker v. Binninger*, 14 N. Y. (4 Kern.) 270; *Elias v. Farley*, 2 Abb. Dec. 11, 5 Abb. Pr. (N. S.) 39, 3 Keyes, 398; *Dean v. Campbell*, 19 Hun, 534. Taking possession by receiving keys of store is sufficient. *Walradt v. Phoenix Ins. Co.*, 64 Hun, 129, 45 State Rep. 908, 19 N. Y. Supp. 293; judgment affirmed 136 N. Y. 375. The mere fact that the goods were, during the life of the execution, within view of the officer, and subject to his control, of itself is not sufficient, unless he at the same time asserts his title to them, by virtue of the execution. *Westervelt v. Pinckney*, 14 Wend. 123. Merely looking at goods and making a memorandum of a levy is insufficient. *Camp v. Chamberlain*, 5 Denio, 198.

³⁶² An inventory, though customary, is not necessary. *Watts v. Cleaveland*, 3 E. D. Smith, 553; *Roth v. Wells*, 29 N. Y. 471.

today.³⁶³ The personal property may be left in the hands of a custodian.³⁶⁴ It is not necessary that the owner of the goods acquiesce in the levy.³⁶⁵ A levy on goods in possession of one other than the owner, by informing the person in possession of the levy, in view of the goods, and indorsing a memorandum of the levy on the execution, is sufficient though the person in possession was the assignor who disclaimed any interest in the goods, and no notice was given by the sheriff to the assignee.³⁶⁶ A levy on the right, title, and interest of the judgment debtor in the goods is equivalent to a levy on the things.³⁶⁷

Delivery of an execution to the sheriff amounts to a levy when he is in actual possession of the goods under prior writs,³⁶⁸ even though the senior execution has been delayed so that, as against other creditors, it is dormant.³⁶⁹ If there is a levy on partnership property, though only for the purpose of selling the interest of one partner, no further acts are necessary to constitute a levy under junior executions for the purpose of selling the whole interest in the goods.³⁷⁰

—**Extent of levy.** The plaintiff has no authority to dictate the extent of the levy any more than the defendant has to limit it.³⁷¹ The sheriff must see to it, at his peril, that suffi-

³⁶³ *Bond v. Willett*, 31 N. Y. 102; *Roth v. Wells*, 29 N. Y. 471; *Hill v. White*, 46 App. Div. 360, 365, 61 N. Y. Supp. 515; *Butler v. Maynard*, 11 Wend. 548. But permitting the debtor to consume the property is constructively, if not actually, fraudulent as against junior executions. *Farrington v. Sinclair*, 15 Johns. 428; *Farrington v. Caswell*, 15 Johns. 430; *Dickenson v. Cook*, 17 Johns. 332.

³⁶⁴ *People v. National Mut. Ins. Co.*, 19 App. Div. 247, 46 N. Y. Supp. 102. Duty, liability, etc., of receiptors, see vol. 2, p. 1477.

³⁶⁵ *Artisans' Bank v. Treadwell*, 34 Barb. 553.

³⁶⁶ *Elias v. Farley*, 2 Abb. Dec. 11, 5 Abb. Pr. (N. S.) 39, 3 Keyes, 398.

³⁶⁷ *Waid v. Gaylord*, 4 T. & C. 41, 1 Hun, 607.

³⁶⁸ *Van Winkle v. Udall*, 1 Hill, 559; *Ryder v. Gilbert*, 16 Hun, 163; *Cresson v. Stout*, 17 Johns. 116; *Slade v. Van Vechten*, 11 Paige, 21; *Dean v. Campbell*, 19 Hun, 534. But if the levy of the former proves a nullity, there is, in such case, no valid levy of the others. *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

³⁶⁹ *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 451.

³⁷⁰ *Waid v. Gaylord*, 1 Hun, 607.

³⁷¹ *Wehle v. Conner*, 83 N. Y. 231, 239.

cient property is levied on. It is held that a levy on property deemed sufficient to satisfy the execution does not preclude the right to thereafter levy on other property under the same execution,³⁷² though there seems to be authority to the contrary.³⁷³

— **Powers and duties of officer making levy.** The powers and rights of an officer in executing the writ are the same as exist in relation to the enforcement of any other writ or process.³⁷⁴ The attorney for the execution creditor may give special directions to the sheriff³⁷⁵ which the sheriff must obey,³⁷⁶ but notice need not be given by plaintiff or his attorney to the sheriff that defendant resides and has property within the county.³⁷⁷ The court will not instruct nor interfere relative to the sheriff's duty.³⁷⁸ The assignment of the judgment after issuance of execution does not, per se, divest the sheriff of authority.³⁷⁹

— **Custody of officer.** The sheriff holds the goods as a bailee for hire so that he must use due diligence to keep them safely but is not an insurer of the absolute safety of the goods.^{380, 381} He should preserve the property with as little expense to the parties as the proper discharge of his obligation will permit.³⁸² He may defend his possession by necessary force,³⁸³

³⁷² *Denvrey v. Fox*, 22 Barb. 522.

³⁷³ *Hoyt v. Hudson*, 12 Johns. 207. Thus, if the officer deliver the goods to a third person, on his giving a receipt to return them or pay the amount of the execution, he cannot afterwards take other goods of the defendant in execution; and this whether the property originally taken was sufficient to satisfy the execution or not, or though the officer had been unable to recover anything on the receipt. *Id.* But see *Denvrey v. Fox*, 22 Barb. 522.

³⁷⁴ Power in making arrest in civil action, see vol. 2, pp. 1337, 1338.

³⁷⁵ *Walters v. Sykes*, 22 Wend. 566.

³⁷⁶ *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 395.

³⁷⁷ *Tomlinson v. Rowe*, Hill & D. Supp. 410.

³⁷⁸ *Adams v. Bowe*, 12 Abb. N. C. 322, note, 3 Civ. Proc. R. (Browne) 191.

³⁷⁹ *Van Kirk v. Sedgwick*, 87 N. Y. 265, 270.

^{380, 381} *Moore v. Westervelt*, 27 N. Y. 234; *Jenner v. Jolliffe*, 6 Johns. 9.

³⁸² *Crofut v. Brandt*, 58 N. Y. 106; *Depew v. Solomonowitz*, 48 App. Div. 512, 62 N. Y. Supp. 916.

but if the property has been taken outside the county, he cannot recover possession forcibly though if he peaceably obtains possession he may defend such possession.³⁸⁴ The judgment creditor, having levied on personal property, may maintain an action in aid of his execution to show that chattel mortgages under which the property is claimed are fraudulent as to him.³⁸⁵

— **Substitution of property.** An agreement between the sheriff and an execution debtor to substitute other property for that levied on is void, though if the sheriff actually levies on the property to be substituted, the levy may be valid.³⁸⁶ But where a judgment debtor has sold part of the goods levied on, and other like goods have been purchased to replace them, such substituted goods are subject to the writ where the judgment debtor neglects, on request, to designate the goods on which the levy was made, and no inventory was taken by the sheriff.³⁸⁷

— **Abandonment.** A sheriff who levies upon goods as the property of defendant may, when he discovers that the goods belong to another, relinquish the levy, and return his execution nulla bona.³⁸⁸ But a relinquishment of the levy by mistake of the officer is of no effect.³⁸⁹ A levy is not deemed abandoned where the sheriff is stayed in his proceedings by an order of court, if he resumes his dominion over the property levied upon as soon as the order is vacated.³⁹⁰

— **Setting aside.** A levy may be set aside where made in bad faith.³⁹¹

“Where an appeal taken from a final judgment to the court of appeals has been perfected, and the security required to stay the execution of the judgment has been given, or where the security given upon an appeal taken from a final judgment

³⁸³, ³⁸⁴ *Hill v. Haynes*, 54 N. Y. 153.

³⁸⁵ *Robinson v. Hawley*, 45 App. Div. 287, 61 N. Y. Supp. 138.

³⁸⁶ *Shelton v. Westervelt*, 8 Super. Ct. (1 Duer) 109.

³⁸⁷ *Roth v. Wells*, 29 N. Y. 471.

³⁸⁸ *Blivin v. Bleakley*, 23 How. Pr. 124.

³⁸⁹ *Colton v. Camp*, 1 Wend. 365.

³⁹⁰ *Bond v. Willett*, 31 N. Y. 102.

³⁹¹ *Jones v. McCarl*, 7 Abb. Pr. 418.

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of the supreme court, a county court, or the city court of the city of New York, is equal to that required to perfect an appeal to the court of appeals and to stay the execution of the judgment, the court, in which the judgment appealed from was rendered, may, in its discretion, and upon such terms as justice requires, make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy made by virtue of a warrant of attachment.^{391a} This section does not confer any new powers on the court, considered as a court of equity.³⁹² It does not impliedly prohibit the court from exercising inherent power in respect to real estate similar to that granted therein in regard to personalty.³⁹³ This section only refers to a case in which an execution has been levied before an undertaking has been given.³⁹⁴ Notice of the motion must be given to the sureties.³⁹⁵ Notice of the application to discharge a levy, on an appeal to the court of appeals, must be given to the sureties on the appeal to the appellate division as well as to those on the new appeal.^{395a}

— **Effect on title to property.** After the levy, the debtor still remains the owner of the property seized,³⁹⁶ so that he has a cause of action against any person unlawfully interfering with the property while in the possession of the sheriff, by which interference its value is impaired or diminished.³⁹⁷ This right of action is necessarily subordinate to the right of the sheriff to sue to recover damages for a loss occasioned by an injury to his special interest in the property created by the

^{391a} Code Civ. Proc. § 1311.

³⁹², ³⁹³ *Skinner v. Hannan*, 81 Hun, 376, 381, 30 N. Y. Supp. 987.

³⁹⁴ *Katz v. Kuhn*, 9 Daly, 172.

³⁹⁵ *Briggs v. Brown*, 13 Abb. N. C. 481.

^{395a} *Foote v. Schmeder*, 5 Weekly Dig. 463.

³⁹⁶ *Marsh v. White*, 3 Barb. 519. He can sell, subject to the lien. *Mumper v. Rushmore*, 79 N. Y. 19; *Hatch v. Collins*, 34 Hun, 314. Compare, however, *Adams v. Bowe*, 12 Abb. N. C. 322, note, 3 Civ. Proc. R. (Browne) 191.

³⁹⁷ *Scott v. Morgan*, 94 N. Y. 508, 515. Compare *Smith v. Reeves*, 33 How. Pr. 183.

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levy.³⁹⁸ There is no cause of action in favor of the creditor for the same injury,³⁹⁹ since any recovery by the sheriff inures to the benefit of the creditor.⁴⁰⁰ A levy on an interest of a mortgagor of chattels deprives the mortgagor of his whole interest and not merely of an interest equal to the amount of the judgment.⁴⁰¹ The levy puts the goods into the custody of the law,⁴⁰² and a levy on an undivided share in a growing crop gives the officer constructive possession of the entire crop.⁴⁰³ In an action by an officer to recover goods taken from his possession, the judgment need not be produced,⁴⁰⁴ but if the officer did not take actual possession he must prove the judgment.⁴⁰⁵

— **Effect of levy as satisfaction of judgment.** A levy on sufficient personal property is a satisfaction of the judgment, as respects junior incumbrancers,⁴⁰⁶ or where the levy on sufficient personal property is voluntarily relinquished by the creditor, as respects subsequent bona fide purchasers of the land bound by the judgment;⁴⁰⁷ though a levy is not generally an “absolute” satisfaction of the judgment though the property is sufficient,⁴⁰⁸ when the debt is not paid and the debtor is not deprived of his property.⁴⁰⁹ But the fact that the collection

³⁹⁸ *Howlands v. Willetts*, 9 N. Y. 173; *Ansonia Brass & Copper Co. v. Babbitt*, 74 N. Y. 397.

³⁹⁹ *Steffin v. Steffin*, 4 Civ. Proc. R. (Browne) 179; *Scott v. Morgan*, 94 N. Y. 508; *Barker v. Mathews*, 1 Denio, 335; *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 541. There is an exception where execution is against attached property. Code Civ. Proc. § 708.

⁴⁰⁰ *People v. Reeder*, 25 N. Y. 304.

⁴⁰¹ *Michelson v. Fowler*, 27 Hun, 159.

⁴⁰² *Smith v. Burtis*, 6 Johns. 197; *Hartwell v. Bissell*, 17 Johns. 128.

⁴⁰³ If, before sale, the debtor becomes owner of the whole, the sheriff may sell the whole. *Ray v. Birdseye*, 5 Denio, 619.

⁴⁰⁴ Proof of the seizure under the execution is sufficient. *Barker v. Miller*, 6 Johns. 195; followed in *Blackley v. Sheldon*, 7 Johns. 32; *Spoor v. Holland*, 8 Wend. 445.

⁴⁰⁵ *Pryne v. Westfall*, 3 Barb. 496.

⁴⁰⁶ *Hayden v. Agent of Auburn State Prison*, 1 Sandf. Ch. 195.

⁴⁰⁷ *Voorhees v. Gros*, 3 How. Pr. 262.

⁴⁰⁸ *Green v. Burke*, 23 Wend. 490; *Ostrander v. Walter*, 2 Hill, 329; *People v. Hopson*, 1 Denio, 574; *Denvrey v. Fox*, 22 Barb. 522; *Bier v. Ash*, 16 Wkly. Dig. 189.

⁴⁰⁹ *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 451; *Viall v. Dater*, 14 Wkly. Dig. 572.

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of the debt by force of the levy is defeated by the act of the execution creditor does not prevent the levy operating as a satisfaction,⁴¹⁰ though if the goods are returned to the debtor,⁴¹¹ or the levy abandoned,⁴¹² or the property is fraudulently withdrawn by the debtor from the officer's power,⁴¹³ there is no satisfaction. The levy of an execution issued on a judgment against a surety is no satisfaction of a judgment against the principal.⁴¹⁴ A debtor who denies his ownership of the property cannot insist that a levy on it was a satisfaction.⁴¹⁵ The judgment is revived by a recovery by the debtor against the creditor for a wrongful levy on exempt property or the property of a third person.⁴¹⁶

§ 2234. Release of partnership property levied on.

Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them, may, at any time before the sale, apply to a judge of the court, or to the county judge of the county, where the seizure was made, upon an affidavit, showing the facts, for an order, directing the officer to release the property, and to deliver it to the applicant.⁴¹⁷

— **Undertaking.** Upon such application, the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect that he will account to the purchaser, upon the sale to be made by virtue of the execution, of the interest of the judgment debtor in the property seized, in like manner as he would be bound to account to an assignee

⁴¹⁰ *McChain v. McKeon*, 9 Super. Ct. (2 Duer) 645.

⁴¹¹ *Holbrook v. Champlin*, Hoff. Ch. 148.

⁴¹² *Green v. Burke*, 23 Wend. 490; *Ostrander v. Walter*, 2 Hill, 329; *Radde v. Whitney*, 4 E. D. Smith, 378.

⁴¹³ *Mickles v. Haskin*, 11 Wend. 125.

⁴¹⁴, ⁴¹⁵ *Ontario Bank v. Hallett*, 8 Cow. 192.

⁴¹⁶ *Piper v. Elwood*, 4 Denio, 165; *Richardson v. McDougall*, 19 Wend. 80; *Newland v. Baker*, 21 Wend. 264.

⁴¹⁷ Code Civ. Proc. § 1413.

of such an interest; and that he will pay to the purchaser the balance, which may be found due upon the accounting, not exceeding a sum, specified in the undertaking, which must be not less than the value of the interest of the judgment debtor, in the property seized by the sheriff, as fixed by the judge. The provisions of section 695 and 696 of the Code apply to the proceedings, taken as prescribed in this and the last section.⁴¹⁸ Where personal property of a partnership has been released upon giving an undertaking, if the execution, by virtue of which the levy was made, is set aside or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment creditor of the same judgment debtor, then having an execution in the hands of the same officer, or of another officer, having authority to levy upon that interest, as if it had been given to obtain a release from a seizure, made by virtue of such an execution.⁴¹⁹

§ 2235. Claims of third persons to property levied on.

If personal property, levied on as the property of the judgment debtor, is claimed, by or in behalf of another person, as his property [an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such property or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case], the officer may, in his discretion, empanel a jury to try the validity of the claim.⁴²⁰ This Code section applies only where the claim to the property is made "after" the levy.⁴²¹ It closely corresponds to section 657 of the Code which relates to the trial of

⁴¹⁸ Code Civ. Proc. § 1414. See vol. 2, pp. 1504, 1508, for sections 695 and 696 of the Code.

⁴¹⁹ Code Civ. Proc. § 1416.

⁴²⁰ Code Civ. Proc. § 1418. The portion in brackets was added by Laws 1904, c. 541. Manner of conducting trial, see Code Civ. Proc. § 108.

⁴²¹ *Craft v. Brandow*, 24 Misc. 306, 52 N. Y. Supp. 1078.

claims to property attached. The determination by the sheriff's jury cannot be reviewed by a motion to set aside the verdict.⁴²²

Section 1419 of the Code, which will not be set forth because of its length, provides for the giving of an undertaking by the judgment creditor, as indemnity to the sheriff, where the jury finds that the property belongs to the claimant. The Code section does not authorize a deposit of money as indemnity.^{423, 424} Since the amendment of 1904, the undertaking must be for not less than twice the value of the property and of the damages, over and above such value, which the jury find will be sustained by the claimant in case the levy is not released, and two hundred and fifty dollars in addition thereto. If a bond is in fact given without a determination of a jury it is valid and enforceable.⁴²⁵

If the property is found to belong to the defendant, the finding does not prejudice the right of the claimant to bring an action to recover the property so levied upon, or damages by reason of the levy, detention, or sale.⁴²⁶

— Form of affidavit.

[Title of court and cause.]

[Venue.]

A. X., being duly sworn, says:

I. That an execution issued in the above-entitled action has been levied by the sheriff of the county of ———, on [name property levied on] as the property of the defendant herein.

II. That said property so levied on is now in the possession of said sheriff by virtue of said levy.

III. That said property, nor any part of it, does not belong to said defendant, but it belongs to ———, who resides at No. ——— street in the city of ———.

IV. That the value of said property is ——— dollars and that defendant will suffer damages in the sum of ——— dollars, over and above such value, if said levy is not released, since [state facts showing how damage in excess of value will be sustained].

[Jurat.]

[Signature.]

⁴²² Cohen v. Climax Cycle Co., 19 App. Div. 158, 46 N. Y. Supp. 4.

^{423, 424} De Sisto v. Stimmel, 31 Misc. 711, 65 N. Y. Supp. 314.

⁴²⁵ Chamberlain v. Belier, 18 N. Y. 115.

⁴²⁶ Code Civ. Proc. § 1420.

Art. V. Levy on Personal Property.—Claims of Third Persons.

— Form of undertaking.

[Title of cause.]

Whereas, ———, sheriff of ——— county, has levied on and taken into his custody, under an execution issued to him in the above-entitled action, certain personal property as the property of defendant [or "plaintiff"], and said property has been claimed by ———, as his property, and an inquisition has been made by a jury impaneled by the said sheriff to try the validity of said claim; and the said jurors having found, by their inquisition, that the said property belongs to the said claimant, and that its value is the sum of ——— dollars [and that said claimant will suffer, in case such levy is not released, the sum of ——— dollars, as damages, over and above such value];^{426a}

Now, therefore, we, ———, of ——— [farmer], and ———, of ——— [merchant], do hereby, jointly and severally, undertake, pursuant to section 1419 of the Code of Civil Procedure, that we will indemnify the said ——— to the amount of ——— dollars,^{426b} against all damages, costs and expenses, in an action to be brought against him by any person, by said claimant, or by his assignee or other representative, by reason of the levy on, detention, or sale, of any of the said property by virtue of the said execution.

[Date.]

[Signatures.]

Signed in presence of ———.

[Acknowledgment, justification of sureties, and approval of judge, as provided for in section 1419 of the Code.]

— Substitution of indemnitors. The rules laid down in sections 1421 to 1427 of the Code as to the substitution of indemnitors in an action against an officer who has made a levy under an execution or an attachment have been considered in the chapter of attachment and will not be repeated in this connection.⁴²⁷

§ 2236. Extent of lien.

A levy on sheep includes the wool then growing and all that may afterwards grow during the existence of the lien;⁴²⁸ but

^{426a} Amendment of 1904 provides for last clause in brackets.

^{426b} The sum must be not less than twice the value of the property and damages as found by the jury, and two hundred and fifty dollars in addition thereto. Code Civ. Proc. § 1419, as amended in 1904.

⁴²⁷ Volume 2, pp. 1548-1553.

⁴²⁸ Such lien continues as well after, as before, severance of the wool. *Youngs v. Williams*, 21 Wkly. Dig. 249.

a levy on property incapable of manual delivery binds only property on hand at the time of the service of the warrant.⁴²⁹

§ 2237. Divestiture of lien.

Setting aside the judgment or execution divests the lien created by a levy.⁴³⁰ But the lien acquired on specific personal property by the levy of an execution is not impaired in favor of a subsequent attaching creditor by the vacating of prior judgments under which a levy had also been made, in an action in the nature of a creditor's suit brought by the attaching creditor.⁴³¹ The lien terminates on a return of the writ.⁴³²

§ 2238. Inspection, before sale, of property levied on.

The sheriff to whom an execution is issued shall, at any time before the sale, on the written request of any person who is a creditor of the person against whom the writ was issued under which the sheriff levied upon the property, exhibit to such creditor the personal property so levied upon under said writ and permit an inspection thereof by such creditor or his agent.⁴³³

§ 2239. Authority to sell.

A sale cannot be made after a release of the judgment,⁴³⁴ or a satisfaction,⁴³⁵ but a sale may be had after the entry of a foreclosure judgment where there has been no foreclosure sale.⁴³⁶ The presumption, in the absence of evidence to the

⁴²⁹ *Gibson v. National Park Bank*, 49 Super. Ct. (17 J. & S.) 429; following *Patterson v. Perry*, 10 Abb. Pr. 82, 18 Super. Ct. (5 Bosw.) 518.

⁴³⁰ *May v. Cooper*, 24 Hun, 7.

⁴³¹ *Lopez v. Campbell*, 163 N. Y. 340.

⁴³² *Watrous v. Lathrop*, 6 Super. Ct. (4 Sandf.) 700; *Walker v. Henry*, 85 N. Y. 130.

⁴³³ Code Civ. Proc. § 1384.

⁴³⁴ *Stilwell v. Carpenter*, 62 N. Y. 639.

⁴³⁵ *Glassner v. Wheaton*, 2 E. D. Smith, 352.

⁴³⁶ *Nutt v. Cuming*, 155 N. Y. 309.

contrary, is that the sheriff has previously made a levy.⁴³⁷ The death of the judgment debtor, after delivery of the execution, does not prevent a sale of the property,⁴³⁸ though it is otherwise where the debtor dies before the issuance of the execution.⁴³⁹ A sale is not authorized merely to collect the sheriff's fees.⁴⁴⁰ A sale without authority vests no title.⁴⁴¹

§ 2240. Notice of sale.

At least six days' previous notice of the time and place of the sale must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city, where the sale is made.⁴⁴² The notice should state the time and place of sale and describe the property to be sold. It should be signed by the sheriff⁴⁴³ and dated. The notice need not give the name of the judgment debtor.⁴⁴⁴ It will be presumed that notices have been duly posted, in the absence of any showing to the contrary.⁴⁴⁵ On directing a resale, notices different from those prescribed by this Code provision cannot be ordered by the court.⁴⁴⁶ So a second notice of a sale, after a postponement of the sale, must be given for the full six days.⁴⁴⁷

⁴³⁷ *Jackson v. Shaffer*, 11 Johns. 513; *Hartwell v. Root*, 19 Johns. 345; *Smith v. Hill*, 22 Barb. 656; *McCombs v. Becker*, 3 Hun, 342, 5 T. & C. 550. That levy will not be presumed to defeat sale by debtor, see ante, § 2228.

⁴³⁸ *Wood v. Morehouse*, 45 N. Y. 368; *Holman v. Holman*, 66 Barb. 215; *Becker v. Becker*, 47 Barb. 497.

⁴³⁹ *Beard v. Sinnott*, 38 Super. Ct. (6 J. & S.) 536.

⁴⁴⁰ *Craft v. Merrill*, 14 N. Y. (4 Kern.) 456, 462; *Jackson v. Anderson*, 4 Wend. 474, 479.

⁴⁴¹ *Carter v. Simpson*, 7 Johns. 535.

⁴⁴² Code Civ. Proc. § 1429.

⁴⁴³ Signature of notice as "sheriff," instead of "late sheriff," is not fatal. *Van Gelder v. Van Gelder*, 26 Hun, 356.

⁴⁴⁴ *Chapman v. Morrill*, 19 Hun, 318.

⁴⁴⁵ *Wood v. Morehouse*, 45 N. Y. 368, 376.

⁴⁴⁶ Directing the giving of notice by mail is unauthorized. *Citizens' Nat. Bank of Hornellsville v. Allison*, 23 Wkly. Dig. 235.

⁴⁴⁷ *Frederick v. Wheelock*, 3 T. & C. 210.

— **Penalty for taking down or defacing.** A person who, before the time fixed for the sale, in a notice of the sale of property, to be made by virtue of an execution, willfully takes down or defaces such a notice put up by the sheriff, or by his authority, forfeits fifty dollars to the judgment creditor, and the same sum to the judgment debtor; unless the notice was defaced or taken down, with the consent of the person seeking to enforce the forfeiture, or the execution was previously satisfied.⁴⁴⁸

— **Effect of want of, or defects in, notice.** An omission by the sheriff to give notice, as required by law, or the taking down or defacing of a notice, when put up, does not affect the validity of a sale, made by virtue of an execution, to a purchaser in good faith, without notice of the omission or offense.⁴⁴⁹ A defective posting known to the purchaser or his attorney makes the sale invalid,⁴⁵⁰ as where notices were not posted in the town where the levy was made.⁴⁵¹

§ 2241. Time for sale.

The sale must be made at public auction between nine a. m. and sunset,⁴⁵² on the day fixed in the notice of sale. When made after sundown the sale is “void.”⁴⁵³ As already stated, the sale may be made after the return day of the execution.⁴⁵⁴

— **Adjournment.** The sale may be adjourned to a different place,⁴⁵⁵ and an adjournment should be granted when otherwise there will be a great sacrifice of the debtor's property.⁴⁵⁶ A demand that the sheriff's costs be taxed has been held not sufficient to require a postponement.⁴⁵⁷

⁴⁴⁸ Code Civ. Proc. § 1385; *Murphy v. Tripp*, 44 Barb. 189.

⁴⁴⁹ Code Civ. Proc. § 1380.

⁴⁵⁰ *Earle v. Willard*, 5 Wkly. Dig. 155.

⁴⁵¹ *Schmidt v. Barry*, 39 State Rep. 403, 21 Civ. Proc. R. (Browne) 21, 15 N. Y. Supp. 122.

⁴⁵² Code Civ. Proc. § 1384.

⁴⁵³ *Carnrick v. Myers*, 14 Barb. 9.

⁴⁵⁴ *Matter of Pond*, 21 Misc. 114, 46 N. Y. Supp. 999.

⁴⁵⁵ *Tinkom v. Purdy*, 5 Johns. 345; *McDonald v. Neilson*, 2 Cow. 139.

⁴⁵⁶ *McDonald v. Neilson*, 2 Cow. 139.

⁴⁵⁷ *Van Gelder v. Van Gelder*, 26 Hun, 356.

§ 2242. Who may sell.

The sheriff himself must conduct the sale unless the employment of an auctioneer is requested by plaintiff or his attorney.⁴⁵⁸ If the sheriff has levied on property in pursuance of the execution, he may sell after the expiration of his term of office.⁴⁵⁹ A deputy who has levied while his principal was in office may complete the sale after his successor has qualified.⁴⁶⁰ An under-sheriff who removes from the county has no power to sell.⁴⁶¹ Except where special provision is otherwise made by law, if the sheriff to whom an execution is delivered dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under-sheriff must proceed. If there is no under-sheriff a person may be appointed to proceed under the writ.⁴⁶²

§ 2243. Manner of conducting sale.

In making the sale, the statutory requirements must be strictly complied with.⁴⁶³ Articles must be pointed out to the bidders and sold specifically.⁴⁶⁴ Money levied on need not be exposed for sale, except where it consists of gold coin, unless the officer is otherwise directed by an order of the judge or by the judgment in the particular cause.⁴⁶⁵

—**Sale in parcels.** Personal property must be offered for sale in such lots and parcels as are calculated to bring the highest price.⁴⁶⁶ This Code provision merely reiterates the com-

⁴⁵⁸ O'Connor v. O'Connor, 47 Super. Ct. (15 J. & S.) 498.

⁴⁵⁹ Code Civ. Proc. § 184, subd. 4, § 186; Wood v. Colvin, 5 Hill, 228; Averill v. Wilson, 4 Barb, 180.

⁴⁶⁰ Jackson v. Collins, 3 Cow. 89; Jackson v. Tuttle, 9 Cow. 233.

⁴⁶¹ Ferguson v. Lee, 9 Wend. 258.

⁴⁶² Code Civ. Proc. § 1388. See Mason v. Sudam, 2 Johns. Ch. 172.

⁴⁶³ Breese v. Bange, 2 E. D. Smith, 474; Husted v. Dakin, 17 Abb. Pr. 137.

⁴⁶⁴ Sheldon v. Soper, 14 Johns. 352; Cresson v. Stout, 17 Johns. 116. Thus, selling thirteen sheep of a flock, without designating the particular sheep sold, is void. Warring v. Loomis, 4 Barb. 484.

⁴⁶⁵ Code Civ. Proc. § 1410.

⁴⁶⁶ Code Civ. Proc. § 1428

mon-law rule.⁴⁶⁷ Especially should articles be sold apart where they are utterly unlike in their character.⁴⁶⁸ On selling personal property subject to a mortgage, it is proper to sell the whole together.⁴⁶⁹ Real and personal property should not be sold together in one lot.⁴⁷⁰ If the property is put up for sale in too large parcels, the debtor or his attorney should object at the time, but the silence of a special agent of the creditor sent to buy the property is not a waiver of a sale in too large parcels.⁴⁷¹ A third person who is not a creditor cannot object.⁴⁷²

—**Sale in view of property.** Except where the officer is expressly authorized to sell property not in his possession, personal property shall not be offered for sale unless it is present and within the view of those attending the sale.⁴⁷³ The property must not only be present but also exposed to view.⁴⁷⁴ But a sale of stereotype plates may be made by producing impressions from the plates for the inspection of the buyer,⁴⁷⁵ and where the articles cannot be gathered so as to be viewed at one time, without great expense, it is sufficient if the officer point them out previous to the sale.⁴⁷⁶ Thus, a sale of hotel silverware, part of which was in adjoining rooms but not locked up, is sufficient.⁴⁷⁷ A sale is valid as to the property present though part is absent.⁴⁷⁸

⁴⁶⁷ *Stief v. Hart*, 1 N. Y. (1 Comst.) 20.

⁴⁶⁸ *Shimer v. Mosher*, 39 Hun, 153.

⁴⁶⁹ *Tift v. Barton*, 4 Denio, 171; *Tugwell v. Bussing*, 48 How. Pr. 89, 4 T. & C. 681.

⁴⁷⁰ *Breese v. Bange*, 2 E. D. Smith, 474, 493.

⁴⁷¹ *Wyman v. Hart*, 12 How. Pr. 122.

⁴⁷² *Stephens v. Baird*, 9 Cow. 274, 277.

⁴⁷³ Code Civ. Proc. § 1423; *Stonebridge v. Perkins*, 141 N. Y. 1. Reiteration of common-law rule.

⁴⁷⁴ *Shimer v. Mosher*, 39 Hun, 153, 156.

⁴⁷⁵ *Bruce v. Westervelt*, 2 E. D. Smith, 440.

⁴⁷⁶ *Tift v. Barton*, 4 Denio, 171.

⁴⁷⁷ *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 74 State Rep. 333, 37 N. Y. Supp. 1037.

⁴⁷⁸ *Linnendoll v. Doe*, 14 Johns. 222.

§ 2244. Who may purchase.

The sheriff, to whom an execution is directed, or the under-sheriff, or deputy-sheriff, holding an execution and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him or to his use is void.⁴⁷⁹

§ 2245. Payment of bid.

A sheriff, in making a sale on execution, must demand money for property sold, and, if that is not paid, he must then and there avoid the sale and resell the property or postpone the sale, giving notice thereof, and then make a new sale at a subsequent time. But if he takes anything but money, gives credit to the purchaser, delivers the property to him and closes the sale, then what he takes must be treated as money in his hands to be applied upon the executions.⁴⁸⁰ Where the sheriff gives time to pay, an execution debtor may pay the amount of the execution before the payment of the bid and thus avoid the inchoate sale.⁴⁸¹ The sheriff may deliver the goods without receiving the money where the execution creditor is the purchaser.⁴⁸²

§ 2246. Setting sale aside.

The court has power, on motion, to set aside the sale.⁴⁸³ The motion may be made by a party to the judgment or by the purchaser, but not by a stranger. The sale may be set aside because of failure to sell in parcels,⁴⁸⁴ or because of failure to sell within view of the property.⁴⁸⁵ So a sale may be set aside

⁴⁷⁹ Code Civ. Proc. § 1387. If officer is party, he may purchase. *Jackson v. Collins*, 3 Cow. 89; *Neilson v. Neilson*, 5 Barb. 565. Under-jailer may purchase. *Jackson v. Anderson*, 4 Wend. 474. As to who may purchase at judicial sales, see post, chapter on judicial sales.

⁴⁸⁰ *Robinson v. Brennan*, 90 N. Y. 208.

⁴⁸¹ *Holmes v. Richmond*, 19 Hun, 634.

⁴⁸² *Nichols v. Ketcham*, 19 Johns. 84.

⁴⁸³, ⁴⁸⁴ *Morgan v. Holladay*, 38 Super. Ct. (6 J. & S.) 53, 48 How. Pr. 86.

⁴⁸⁵ *Id.*; *Welch v. Woodruff*, 20 State Rep. 840, 3 N. Y. Supp. 622.

 Art. V. Sale of Personal Property.

on motion of plaintiff where property was bid in for defendant for less than one-tenth its value.⁴⁸⁶ But a resale will not be ordered merely because plaintiff's agent by mistake bid less than he was directed to.⁴⁸⁷ One who points out property as belonging to a third person cannot afterwards claim that it was his own, as against the sheriff,⁴⁸⁸ and one who forbids a sale on the ground that property is exempt cannot thereafter object that the sale was invalid in other respects.⁴⁸⁹

§ 2247. Title and possession of purchaser.

The statute of frauds applies to the sale so that the sale must be accompanied by an immediate delivery and followed by an actual and continued change of possession, whether the execution creditor or a third person becomes the purchaser.⁴⁹⁰ As a general rule an irregularity in the judgment or in the issuing of an execution will not affect the title of a bona fide purchaser, without notice,⁴⁹¹ but a neglect on the part of the sheriff to comply with the requirements of the statute, such as omitting to give the requisite notice of sale, renders the sale irregular.⁴⁹² A sale to a bona fide purchaser cannot be defeated on the ground that no levy was made until after the return day.⁴⁹³ So the title of a purchaser at a sale under several executions is not affected by the fact that some of the executions were dormant,⁴⁹⁴ nor by a defect in the judgments on which a part of the executions were issued.⁴⁹⁵ The rule of caveat emptor applies.⁴⁹⁶ The purchaser obtains the title of

⁴⁸⁶ *Bixly v. Mead*, 18 Wend. 611.

⁴⁸⁷ *Vandenburgh v. Briggs*, 7 Cow. 367.

⁴⁸⁸ *Stephens v. Baird*, 9 Cow. 274; *Dezell v. Odell*, 3 Hill, 215; *Chapman v. O'Brien*, 34 Super. Ct. (2 J. & S.) 524.

⁴⁸⁹ *Smith v. Hill*, 22 Barb. 656.

⁴⁹⁰ *Stimson v. Wrigley*, 86 N. Y. 333. See, also, *Woodworth v. Woodworth*, 21 Barb. 343.

⁴⁹¹, ⁴⁹² *Breese v. Bange*, 2 E. D. Smith, 474, 493, and cases cited.

⁴⁹³ *Jackson v. Rosevelt*, 13 Johns. 97; *Jackson v. Delancy*, 13 Johns. 536.

⁴⁹⁴ *Richards v. Allen*, 3 E. D. Smith, 399.

⁴⁹⁵ *Bruce v. Westervelt*, 2 E. D. Smith, 440.

⁴⁹⁶ *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

the judgment debtor,⁴⁹⁷ as it existed on the day of the delivery of the execution,⁴⁹⁸ subject to the rights of any bona fide purchaser before a levy.⁴⁹⁹ The title to goods of one person, wrongfully sold on execution as the property of another, does not pass to the purchaser, to the exclusion of the title of the true owner in possession, although the purchaser may have acted in entire good faith.⁵⁰⁰ A sale of all the right and title of the mortgagor of chattels passes the execution creditor's right to treat the mortgage void for omission to file it.⁵⁰¹ A judgment creditor who becomes a purchaser at the execution sale stands in the position of a purchaser in good faith;⁵⁰² but where the goods were fraudulently obtained by the debtors he obtains no title as against the defrauded seller.⁵⁰³ An announcement at the sale, in the hearing of the purchaser, that the property was to be sold subject to a chattel mortgage, does not render the purchaser personally liable on the mortgage.⁵⁰⁴ A purchaser may attack the validity of a mortgage on the chattels sold, except where the property is sold expressly subject to the mortgage.⁵⁰⁵

—**Effect of reversal of judgment.** If the judgment is void, a reversal annuls the title of the purchaser but if the judgment is reversed for errors in the proceedings the title of a stranger who has purchased at the sheriff's sale is valid,⁵⁰⁶

⁴⁹⁷ A sale, absolute in terms, of leased goods, as the goods of the lessee, cannot divest the lessor's interest. *Van Antwerp v. Newman*, 2 Cow. 543. Sale passes nothing to purchaser where debtor's title was fraudulent. *Van Cleef v. Fleet*, 15 Johns. 147; *Mowrey v. Walsh*, 8 Cow. 238.

⁴⁹⁸ *Thompson v. Van Vechten*, 5 Abb. Pr. 458.

⁴⁹⁹ *Fuller v. Allen*, 7 Abb. Pr. 12.

⁵⁰⁰ *Chambers v. Lewis*, 28 N. Y. 454.

⁵⁰¹ *Porter v. Parmley*, 52 N. Y. 185.

⁵⁰² *Creegan v. Robertson*, 74 Hun, 22, 56 State Rep. 161, 26 N. Y. Supp. 326.

⁵⁰³ *Devoe v. Brandt*, 53 N. Y. 462.

⁵⁰⁴ *Hamill v. Gillespie*, 48 N. Y. 556.

⁵⁰⁵ *Wagner v. Jones*, 7 Daly, 375; *Porter v. Parmley*, 52 N. Y. 185, 190.

⁵⁰⁶ 3 Freeman, Executions, § 345; *Woodcock v. Bennet*, 1 Cow. 711; *Wood v. Jackson*, 8 Wend. 9; *Kissock v. Grant*, 34 Barb. 144, 150.

unless he is a purchaser with notice of the errors or irregularities on account of which the reversal is directed.⁵⁰⁷ If the judgment creditor or his attorney purchases, his title falls on a reversal of the judgment.⁵⁰⁸ On reversal, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires.⁵⁰⁹

— **Actions by purchaser.** The purchaser may sue to recover possession. In an action of trover against a third person, plaintiff is bound to prove not only the execution under which he purchased but also the judgment. As against defendant in the execution, it is not necessary to produce the judgment, because he is a party to the record, but otherwise as respects a stranger.⁵¹⁰

§ 2248. Application of the proceeds.

The avails of the property of a judgment debtor, when sold on the execution, are to be paid to the creditors on whose execution it is sold.⁵¹¹ Such proceeds should not, however, be applied on an execution which has expired by lapse of time.⁵¹² Of course, if the sale is expressly subject to certain liens, such lienors are not entitled to participate in the proceeds.⁵¹³ The proceeds of a sale under a junior execution should be applied on the senior execution⁵¹⁴ where not dormant.⁵¹⁵ And where the sheriff makes a partial but insufficient levy under the writ first delivered to him and then levies junior writs on other and separate property, the proceeds of the levies under the junior writs will enure to the benefit of the judgment creditor whose

⁵⁰⁷ In such a case, an action to set aside the sale may be maintained. *Winterson v. Hitchings*, 9 Misc. 322, 60 State Rep. 445, 30 N. Y. Supp. 260.

⁵⁰⁸ 3 Freeman, Executions, § 347.

⁵⁰⁹ Code Civ. Proc. § 1323.

⁵¹⁰ *Yates v. St. John*, 12 Wend. 74; *Dane v. Mallory*, 16 Barb. 46.

⁵¹¹, ⁵¹² *Kingston Bank v. Eltinge*, 40 N. Y. 391, 395.

⁵¹³ *Matter of West Side Elec. Light & Power Co.*, 35 State Rep. 799, 12 N. Y. Supp. 478.

⁵¹⁴ *Russell v. Gibbs*, 5 Cow. 390; *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 451.

⁵¹⁵ *Platt v. Burekle*, 1 How. Pr. 226.

writ was first delivered to the sheriff.⁵¹⁶ The sheriff may turn over the proceeds to the clerk of a county where the judgment roll is filed and where the execution is to be returned.⁵¹⁷ If the sheriff collects the money on the execution but fails to pay it over, an action therefor may be maintained against him without any previous demand.⁵¹⁸ Money collected by sale of goods upon two executions delivered together, issued upon judgments docketed at the same time, is to be applied equally, until the smaller one is satisfied.⁵¹⁹ Where a sheriff has two executions against the same defendant, and having levied part of the amount of the prior execution, proceeds, after the return day of that execution, to make another levy, he must apply the sum thus made to the junior execution.⁵²⁰ A sheriff who has made a sale under an execution, cannot shield himself from actions by junior judgment creditors, if there is a balance in his hands after deducting his fees and disbursements and paying prior executions, by the fact that he has returned prior executions unsatisfied.⁵²¹

The court has power to determine the right to the proceeds of the sale, on a motion,⁵²² but where there is a doubt as to who is entitled to the proceeds the claimant will be left to his action.⁵²³ The pendency of an action does not bar a motion for the same relief.⁵²⁴ The motion for directions as to the application of the proceeds may be made by the sheriff in his own county though the executions in his hands are issued on judgments rendered in counties outside the judicial district in which he resides.⁵²⁵ If, by a mistake of fact, the moneys

⁵¹⁶ Gillig v. George C. Treadwell Co., 148 N. Y. 177; Gillig v. Grant, 23 App. Div. 596, 49 N. Y. Supp. 78.

⁵¹⁷, ⁵¹⁸ Nelson v. Kerr, 59 N. Y. 224.

⁵¹⁹ Campbell v. Ruger, 1 Cow. 215.

⁵²⁰ Vail v. Lewis, 4 Johns. 450; Slingerland v. Swart, 13 Johns. 255.

⁵²¹ Salter v. Bowe, 32 Hun, 236.

⁵²² Phillips v. Wheeler, 67 N. Y. 104.

⁵²³ Mills v. Davis, 53 N. Y. 349. An action lies. *Ryder v. Gilbert*, 16 Hun, 163.

⁵²⁴, ⁵²⁵ Phillips v. Wheeler, 67 N. Y. 104.

are paid to the wrong creditor, the creditor entitled thereto may sue to recover back money paid under a mistake of fact.⁵²⁶

ART. VI. SALE OF REAL PROPERTY.

§ 2249. Scope of article.

This article will embrace, *inter alia*, a construction of the Code provisions (§§ 1430-1486) to be found in articles three and four of title two of chapter thirteen of the Code, in so far as they relate to the "sale" of real property. The expression, "real property," as used in said Code provisions, includes leasehold property, where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereupon.⁵²⁷ What has been stated in the preceding article as to sales of personal property applies in so far as the authority to sell is concerned, or who may sell, or who may purchase, or the payment of the bid, or the disposition of the proceeds.

§ 2250. Property which may be sold.

In the chapter on attachments,⁵²⁸ the exemption of certain real property, such as cemeteries and homesteads, has been considered. Without further noticing exempt property, it becomes necessary to determine what estates in land may be sold on execution. The rule is believed to be that when a judgment is docketed so as to become a lien on real property and chattels real in the county,⁵²⁹ all such property, or interests therein, which the owner can himself sell is subject to sale on execution.⁵³⁰ And land in possession of the execution debtor is *prima facie* liable to be sold.⁵³¹ Real estate situated in an-

⁵²⁶ *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Gillig v. Grant*, 23 App. Div. 596, 49 N. Y. Supp. 78.

⁵²⁷ Code Civ. Proc. § 1430.

⁵²⁸ Volume 2, pp. 1425-1428, 1430.

⁵²⁹ Code Civ. Proc. § 1251.

⁵³⁰ *Beach v. Hollister*, 3 Hun, 519.

⁵³¹ Mere claim of ownership cannot, however, be sold. *Hagaman v.*

other state is not subject to execution here.⁵³² Upon a conveyance to husband and wife jointly, the husband's interest may be sold on execution against him, and the purchaser acquires an estate for the life of the husband, and, in case he survives his wife, the entire estate, notwithstanding a subsequent divorce for the adultery of the husband.⁵³³ Rent reserved on a lease in fee cannot be sold on an execution against the owner, because not an interest in land which is bound by a judgment.⁵³⁴

A new execution against property, issued after the death of the judgment debtor while in custody under a body execution or after his discharge pursuant to the direction of the judgment creditor after thirty or more days in custody, cannot be enforced against an interest in real property, including a chattel real, which was purchased, in good faith, from the judgment debtor, after the recovery of the judgment upon which it is issued; or which was sold by virtue of an execution issued upon a previous or subsequent judgment.⁵³⁵

While personal property is primarily subject to sale, a stranger cannot object to the enforcement of the writ against real property of one defendant while a co-defendant has personal property.⁵³⁶

—**Land fraudulently conveyed.** Land fraudulently conveyed may be sold on an execution against the grantor.⁵³⁷

Jackson, 1 Wend. 502. Proof of continued possession of premises for nearly five years is sufficient to raise a presumption of legal estate in defendant, which would be the subject of sale on execution. *Dickinson v. Smith*, 25 Barb. 102.

⁵³² *Runk v. St. John*, 29 Barb. 585.

⁵³³ *Beach v. Hollister*, 3 Hun, 519, 5 T. & C. 568.

⁵³⁴ *Payn v. Beal*, 4 Denio, 405.

⁵³⁵ Code Civ. Proc. § 1495.

⁵³⁶ *Smith v. McGowan*, 3 Barb. 404, 1 Code R. 27.

⁵³⁷ *Bergen v. Carman*, 79 N. Y. 146, 153. A judgment creditor may sell lands fraudulently conveyed prior to the entry of the judgment without first obtaining a decree adjudging such conveyance to be void, and the purchaser, at the execution sale, may impeach the questionable conveyance. *Smith v. Reid*, 134 N. Y. 568. It seems, however, that the fraudulent grantor may convey a good title to a bona fide purchaser, and such a conveyance would destroy the lien of the judgment. *Id.*

— **Trust property.** The Code provides as follows: “Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution, issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law for the mode of subjecting it to his debts.”⁵³⁸ Where the consideration for the sale of land is paid by one person and title taken in the name of another, the former has no interest that can be sold on execution.⁵³⁹

— **Lands held adversely.** Land held adversely can be sold on execution against the true owner.⁵⁴⁰

— **Interest of person holding contract for purchase of land.** The interest of a person holding a contract for the purchase of land cannot be sold on execution,⁵⁴¹ even though the purchaser has paid all the purchase money,⁵⁴² and the same rule applies to a remote grantee;⁵⁴³ but if the possession is held by virtue of parol permission the purchaser is not within the statute, and his estate may be sold.⁵⁴⁴

— **Expectant estate.** An expectant estate is alienable in the same manner as an estate in possession.⁵⁴⁵ It follows that such an estate may be sold on execution. A vested future

A subsequent purchaser from the fraudulent grantee cannot claim bona fides, where at the time of his purchase the execution purchaser was in possession claiming title under the sheriff's deed. *Id.*

⁵³⁸ Code Civ. Proc. § 1431.

⁵³⁹ *Donovan v. Sheridan*, 37 Super. Ct. (5 J. & S.) 256; *Bates v. Lidgerwood Mfg. Co.*, 50 Hun, 420, 3 N. Y. Supp. 307.

⁵⁴⁰ *Trimm v. Marsh*, 54 N. Y. 599; *Truax v. Thorn*, 2 Barb. 156, 159; followed in *Sandiford v. Frost*, 9 App. Div. 55, 41 N. Y. Supp. 103.

⁵⁴¹ Code Civ. Proc. § 1253; *Jackson v. Scott*, 18 Johns. 94; *Boughton v. Bank of Orleans*, 2 Barb. Ch. 458; *Bates v. Lidgerwood Mfg. Co.*, 50 Hun, 420, 3 N. Y. Supp. 307; *Watson v. Le Row*, 6 Barb. 481, 484.

⁵⁴² *Watson v. Le Row*, 6 Barb. 481.

⁵⁴³ *Sage v. Cartwright*, 9 N. Y. (5 Seld.) 49; *Sheridan v. House*, 4 Abb. Dec. 218, 4 Keyes, 569.

⁵⁴⁴ *Talbot v. Chamberlin*, 3 Paige, 219; *Kellogg v. Kellogg*, 6 Barb. 116, 127.

⁵⁴⁵ Real Property Law, § 49.

estate though liable to be defeated by the death of the grantee before the death of the tenant for life may be sold.⁵⁴⁶ A reversionary interest is leviable, though contingent.⁵⁴⁷

— **Estates for years.** Estates for years are chattels real⁵⁴⁸ which may be sold on execution.⁵⁴⁹ However, a devise for life, for support, with remainder over, cannot be levied on, as against the life tenant.⁵⁵⁰ Leasehold property is subject to sale where the lessee or his assignee is possessed, at the time of the sale, of at least five years unexpired term of the lease, and also of the building or buildings, if any, erected thereon.⁵⁵¹

— **Estates at will.** Estates at will or by sufferance are not liable to sale on execution.⁵⁵²

— **Estates by curtesy.** An estate of tenant by the curtesy initiate may be sold.⁵⁵³

— **Equity of redemption.** The Code provides that the judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution issued "upon a judgment recovered for the mortgage debt or any part thereof."⁵⁵⁴ On any other judgment, however, the equity of redemption may be sold.⁵⁵⁵ Lands mortgaged cannot be sold on an execution against the "mortgagee," before foreclosure, though the debt is due and the estate of the mortgagee has become absolute at law,⁵⁵⁶ and notwithstanding the mortgagee has been let into possession.⁵⁵⁷

⁵⁴⁶ *Sheridan v. House*, 4 Abb. Dec. 218, 4 Keyes, 569; followed in *Moore v. Littel*, 41 N. Y. 66.

⁵⁴⁷ *Woodgate v. Fleet*, 44 N. Y. 1.

⁵⁴⁸ Real Property Law, § 23.

⁵⁴⁹ *Bigelow v. Finch*, 17 Barb. 394.

⁵⁵⁰ *Macomber v. Bank of Batavia*, 12 Hun, 294.

⁵⁵¹ Code Civ. Proc. § 1430.

⁵⁵² Real Property Law, § 23.

⁵⁵³ *Schermerhorn v. Miller*, 2 Cow. 439.

⁵⁵⁴ Code Civ. Proc. § 1432; *Trimm v. Marsh*, 54 N. Y. 599.

⁵⁵⁵ *Waters v. Stewart*, Caines Cas. 47. It is immaterial that mortgagee has taken possession. *Trimm v. Marsh*, 54 N. Y. 599.

⁵⁵⁶ *Jackson v. Willard*, 4 Johns. 41.

⁵⁵⁷ *Trimm v. Marsh*, 3 Lans. 509.

— **Property in custody of the law.** Real estate in the hands of a receiver cannot be sold without leave of court.⁵⁵⁸

§ 2251. Levy.

A formal levy on land is unnecessary as is an endorsement on the execution.⁵⁵⁹ The execution creditors acquire liens in the order in which their judgments are docketed and their priority is not affected by suits brought to set aside a fraudulent transfer of such real estate.⁵⁶⁰

§ 2252. Notice of sale.

The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale, as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, or published in an incorporated village, a part of which is within the county; if there is a newspaper published in such county or village; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.⁵⁶¹ The publication

⁵⁵⁸ Walling v. Miller, 108 N. Y. 173, 178. Attachment of property in custodia legis, see vol. 2, p. 1414.

⁵⁵⁹ Wood v. Colvin, 5 Hill, 228; Colt v. Phoenix F. Ins. Co., 54 N. Y. 595; Van Gelder v. Van Gelder, 26 Hun, 356.

⁵⁶⁰ Wilkinson v. Paddock, 57 Hun, 191, 197, 11 N. Y. Supp. 442.

⁵⁶¹ Code Civ. Proc. § 1434. There is, at present, no state paper. What is a newspaper, see Williams v. Colwell, 14 App. Div. 26, 43 N. Y. Supp. 720, 1167. Penalty for taking down or defacing notice of sale, see Code Civ. Proc. § 1385. Taking down or defacing does not affect validity of sale to purchaser in good faith without notice of the offense. *Id.* § 1386.

is regular if the original is posted up for the six weeks required, and a copy is, during the six weeks, published weekly, six times, although the full period of six weeks does not elapse after publication commenced, and before the sale.⁵⁶² Notice is given that the public may know where, and what, is the property they are invited to purchase,⁵⁶³ and that all may bid and become purchasers on equal terms.⁵⁶⁴ Where there are several executions in the hands of the sheriff, a sale of real property, though only one is specified in the notice, is deemed to be made under all which affect the property.⁵⁶⁵ But a sale of real property, advertised to be had under specified executions in the sheriff's hands, is not to be deemed a sale at the instance of a judgment creditor whose execution is delivered to the sheriff after the first publication of the advertisement, and is not specified in the notice of sale, although the sale is postponed for more than six weeks after the reception of the junior execution, and such postponement is regularly advertised.⁵⁶⁶

—**Description of property.** “In each notice, specified in the last section, the real property to be sold must be described with common certainty, by setting forth the name of the township or traet, and the number of the lot, if there is any, or by some other appropriate description. The validity of a sale is not affected by the fact that the property sold is part only of the property advertised to be sold.”⁵⁶⁷

—**Effect of failure to give, or irregularity in, notice.** A sheriff who sells real property, by virtue of an execution, with-

⁵⁶² *Olcott v. Robinson*, 21 N. Y. 150; *Wood v. Morehouse*, 45 N. Y. 368. Who must pay expense of continuing advertisement. *Smith v. Martin*, 18 Wend. 590; *Van Gelder v. Van Gelder*, 26 Hun, 356.

⁵⁶³ *Jackson v. Delancy*, 13 Johns. 539.

⁵⁶⁴ *Mason v. White*, 11 Barb. 185.

⁵⁶⁵ *Van Camp v. Searle*, 147 N. Y. 150; s. c. in lower court, 79 Hun, 134, 61 State Rep. 349, 24 Civ. Proc. R. (Scott) 16, 29 N. Y. Supp. 757; *Mascraft v. Van Antwerp*, 3 Cow. 334; *Husted v. Dakin*, 17 Abb. Pr. 137.

⁵⁶⁶ *Husted v. Dakin*, 17 Abb. Pr. 137.

⁵⁶⁷ Code Civ. Proc. § 1435. See *O'Donnell v. Lindsay*, 39 Super. Ct. (7 J. & S.) 523.

out having given notice thereof, as prescribed, or otherwise than as prescribed, forfeits one thousand dollars to the party injured, in addition to the damages which the latter sustains thereby.⁵⁶⁸ But the omission of the sheriff to give notice, as required by law, does not affect the validity of the sale to a purchaser in good faith without notice of the omission.⁵⁶⁹ The sheriff's deed is presumptive evidence that he has performed his duty in giving the notices required.⁵⁷⁰

§ 2253. Sale.

The sale must be at public auction, between the hour of nine o'clock in the morning and sunset.⁵⁷¹ The sale may be of a part only of the property advertised to be sold.⁵⁷² A sale made after the lien of the judgment has terminated conveys no title.⁵⁷³ So a sale of land of a third person is void.⁵⁷⁴ Land cannot be resold in the purchaser's hands, on a second execution against the same debtor.⁵⁷⁵ The rules hitherto laid down as to who may purchase personal property apply equally well to real property.⁵⁷⁶

—**Excessive sales.** No more real property shall be exposed for sale than it appears to be necessary to sell, in order to satisfy the execution.⁵⁷⁷ Such a sale is fraudulent and may be set aside,⁵⁷⁸ though sometimes it may be necessary to sell

⁵⁶⁸ Code Civ. Proc. § 1436.

⁵⁶⁹ Code Civ. Proc. § 1386. Judgment creditor is purchaser in good faith. *Wood v. Morehouse*, 45 N. Y. 368.

⁵⁷⁰ *Clute v. Emmerich*, 21 Hun, 122, 128.

⁵⁷¹ Code Civ. Proc. § 1384.

⁵⁷² Code Civ. Proc. § 1435.

⁵⁷³ *Pierce v. Fuller*, 36 Hun, 179.

⁵⁷⁴ So held where property of Truman Hildreth was sold on execution against Freeman Hildreth. *Farnham v. Hildreth*, 32 Barb. 277.

⁵⁷⁵ *Hewson v. Deygert*, 8 Johns. 257.

⁵⁷⁶ See ante, § 2244.

⁵⁷⁷ Code Civ. Proc. § 1437.

⁵⁷⁸ *Hewson v. Deygert*, 8 Johns. 257; *Woods v. Monell*, 1 Johns. Ch. 502; *Jackson v. Newton*, 18 Johns. 355; *Tiernan v. Wilson*, 6 Johns. Ch. 411; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Troup v. Wood*, 4 Johns. Ch. 228; *Groff v. Jones*, 6 Wend. 522.

more real property than required to satisfy the execution, as where the property cannot be subdivided to advantage.⁵⁷⁹

— **Sale in mass.** “Where real property, offered for sale by virtue of an execution, consists of two or more known lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, or any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly.”⁵⁸⁰ “Several known lots,” etc., means land in fact subdivided and not land capable of subdivision.⁵⁸¹ The clause allowing grantees to require a sale in parcels was intended to facilitate a redemption by them. The sheriff should ascertain the situation of the property before he sells and then use his best judgment in deciding whether it will be better to sell in mass or in parcels. The honest exercise of his discretion is final.⁵⁸² On an execution against all the tenants in common of a farm, the sheriff should sell the interest of all together, unless required by the owner, or a party entitled to redeem, to sell separately.⁵⁸³ A sale in mass at the request of the parties is valid.⁵⁸⁴ At any event, a sale in mass is merely voidable,⁵⁸⁵ and will not be vacated after a great lapse of time.⁵⁸⁶ This Code provision is directory and not mandatory, so that the sale will not be

⁵⁷⁹ O'Donnell v. Lindsay, 39 Super. Ct. (7 J. & S.) 523, 531.

⁵⁸⁰ Code Civ. Proc. § 1437; O'Donnell v. Lindsay, 39 Super. Ct. (7 J. & S.) 523; McIntyre v. Sanford, 9 Wkly. Dig. 277, 9 Daly, 21. A demand that a sale of real estate under execution should be made in parcels, where it does not appear that such parcels are distinct or separated by a fence, and they seem to be pieces of a whole lot arbitrarily cut off by means of a description different from that which has been advertised, such demand being made on the day of the sale and for the apparent purpose of embarrassing the parties, may properly be refused. Van Gelder v. Van Gelder, 26 Hun, 356.

^{581, 582} O'Donnell v. Lindsay, 39 Super. Ct. (7 J. & S.) 523, 529, 530.

⁵⁸³ Neilson v. Neilson, 5 Barb. 565.

⁵⁸⁴ Bruce v. Westervelt, 2 E. D. Smith, 440.

⁵⁸⁵ Cunningham v. Cassidy, 17 N. Y. 276; Husted v. Dakin, 17 Abb. Pr. 137.

⁵⁸⁶ Jackson v. Newton, 18 Johns. 355; Mohawk Bank v. Atwater, 2 Paige, 54; Dixon v. Dixon, 38 Misc. 652, 658, 78 N. Y. Supp. 255.

set aside, after a conveyance, because of a failure to sell in parcels, especially where no injury resulted to the moving party because thereof.⁵⁸⁷ One not a creditor,⁵⁸⁸ or a subsequent redeeming creditor,⁵⁸⁹ cannot question the sale because made in mass.

— **Effect of sale.** The sale extinguishes the lien of the judgment,⁵⁹⁰ notwithstanding there is a balance left due,⁵⁹¹ or that plaintiff gives credit and the purchaser never performs,⁵⁹² or that the sale is void as against defendant's creditors because of a fraudulent arrangement between him and plaintiff,⁵⁹³ or that the debtor die and his estate terminates before the purchaser is entitled to enter on the land;⁵⁹⁴ but a sale of a third person's land bid in by plaintiff under a misapprehension should not be considered as a satisfaction.⁵⁹⁵ An agreement to stifle competition among bidders is fraudulent and the execution is deemed satisfied.⁵⁹⁶

— **Setting sale aside.** Either the judgment creditor, the judgment debtor, or the purchaser may move to set aside the sale,⁵⁹⁷ unless from some cause he has ceased to be prejudiced or affected by it, or by his own misconduct he has brought

⁵⁸⁷ *Hargin v. Wicks*, 92 Hun, 155, 36 N. Y. Supp. 375.

⁵⁸⁸ *Stephens v. Baird*, 9 Cow. 274.

⁵⁸⁹ *Bennett v. Bagley*, 22 Hun, 408.

⁵⁹⁰ *Forsyth v. Clark*, 3 Wend. 637; *Husted v. Dakin*, 17 Abb. Pr. 137; *Weaver v. Toogood*, 1 Barh. 238.

⁵⁹¹ But the lien may attach to a subsequently acquired title of the debtor. *Russell v. Allen*, 10 Paige, 249.

⁵⁹² *Driggs v. Simson*, 60 N. Y. 641.

⁵⁹³ *Gardenier v. Tubbs*, 21 Wend. 169.

⁵⁹⁴ A purchase by the judgment creditor, at the sheriff's sale on execution, of the only property owned by the judgment debtor, in this case a life estate in land, for the amount due him, operates as a satisfaction of the judgment, even though the debtor die, and his estate terminates before the purchaser is entitled to enter upon the land; and he cannot then maintain an action to have the execution vacated and set aside. *Kleinhenz v. Phelps*, 6 Hun, 568.

⁵⁹⁵ *Schermerhorn v. Barhydt*, 9 Paige, 28.

⁵⁹⁶ *Troup v. Wood*, 4 Johns. Ch. 228.

⁵⁹⁷ Assignee in bankruptcy may move. *Pardee v. Leitch*, 6 Lans. 303.

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about the wrong of which he complains.⁵⁹⁸ So a sale made by a mistake in description has been vacated on the motion of the deputy-sheriff who made the sale.⁵⁹⁹ Oppressive action of the sheriff in making the sale,⁶⁰⁰ or a mistake of the execution creditor as to the land to be sold,⁶⁰¹ or a refusal of a tender of the amount of the execution and the fees,⁶⁰² or a sale under a general execution rather than an execution running against the property in the order prescribed by the statute, where the action is commenced by attachment,⁶⁰³ is ground for setting aside the sale; but a mere failure to file the certificate of sale,⁶⁰⁴ or error in using the word "plaintiff" in the execution where the word "defendant" should have been used,⁶⁰⁵ is not ground for setting aside the sale. Inadequacy of price, in order to constitute ground for setting aside the sale, must be coupled with some other circumstances such as fraud,⁶⁰⁶ or a defective notice of sale,⁶⁰⁷ or a sale in mass.⁶⁰⁸ Mere inadequacy of price is not, of itself, sufficient.⁶⁰⁹ The sale will not be set aside on the ground that the lands were in the possession of a receiver previously appointed, especially in view of the fact that the judgment in a creditor's suit, based upon the same judgment upon which the execution was issued, had established its lien and directed its enforcement.⁶¹⁰ So a mistake of the plaintiff's agent in omitting to bid is not ground.⁶¹¹

⁵⁹⁸ Freeman, Executions, § 305.

⁵⁹⁹ Wright v. Hooker, 4 Cow. 415.

⁶⁰⁰ McDonald v. Neilson, 2 Cow. 139; Welch v. James, 22 How. Pr. 474; Cantine v. Clark, 41 Barb. 629. Failure to sell in parcels, see ante, p. 3143.

⁶⁰¹ Wambaugh v. Gates, 11 Paige, 505.

⁶⁰² Mason v. Sudam, 2 Johns. Ch. 172.

⁶⁰³ Place v. Riley, 32 Hun, 17, 4 Civ. Proc. R. (Browne) 393.

⁶⁰⁴ O'Brien v. Hashagen, 20 Hun, 564.

⁶⁰⁵ McIntyre v. Sanford, 9 Daly, 21, 9 Wkly. Dig. 277.

⁶⁰⁶ Bruce v. Kelly, 39 Super. Ct. (7 J. & S.) 27.

⁶⁰⁷ O'Donnell v. Lindsay, 39 Super. Ct. (7 J. & S.) 523.

⁶⁰⁸ McIntyre v. Sanford, 89 N. Y. 634.

⁶⁰⁹ Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202.

⁶¹⁰ Matter of Loos, 50 Hun, 67, 23 State Rep. 863, 3 N. Y. Supp. 383; following Chautauque County Bank v. Risley, 19 N. Y. 369.

⁶¹¹ Bixly v. Mead, 18 Wend. 611.

And an erroneous statement in the execution of the date of the docket in the county where the sale was made, naming instead the date of the original docket in another county, does not render the sale void nor will the sale be set aside because thereof after the lapse of many years.⁶¹² So the fact that the sale purports to be of all the interest the debtor had in the premises on a date other than the day of the docketing of the judgment is not fatal where nobody could have been misled or injured thereby.⁶¹³

The sale may be set aside on motion,⁶¹⁴ or an original action may be brought.⁶¹⁵ If a motion is made, notice should be given to the judgment debtor.⁶¹⁶ Laches in moving may preclude relief.⁶¹⁷

§ 2254. Certificate of sale.

The sheriff, who sells real property, by virtue of an execution, must make out, subscribe, and acknowledge before an officer authorized to take the acknowledgment of a deed, duplicate certificates of the sale, containing:

1. The name of each purchaser, and the time when the sale was made.

2. A particular description of the property sold.

3. The price bid for each distinct parcel separately sold.

4. The whole consideration money paid.⁶¹⁸ This Code sec-

⁶¹² *Dixon v. Dixon*, 38 Misc. 652, 658, 78 N. Y. Supp. 255.

⁶¹³ *Clute v. Emmerich*, 21 Hun, 122, 129.

⁶¹⁴ *Morgan v. Holladay*, 38 Super. Ct. (6 J. & S.) 53, 48 How. Pr. 86. Assignee of purchaser is proper party to move against. *Pardee v. Leitch*, 6 Lans. 303.

⁶¹⁵ *O'Donnell v. Lindsay*, 39 Super. Ct. (7 J. & S.) 523; *Stilwell v. Carpenter*, 62 N. Y. 639. In an action by the equitable owner of land, to set aside a sale of it upon execution on a judgment against one having merely a prima facie legal title, the attorney in the judgment and execution, who claims no interest in the judgment or in the purchase at the sale, is not a proper party. *Tisdale v. Jones*, 38 Barb. 523.

⁶¹⁶ *Nagle v. Junker*, 17 Wkly. Dig. 438.

⁶¹⁷ *Clowes v. Dickenson*, 9 Cow. 403; *Cunningham v. Cassidy*, 17 N. Y. 276.

⁶¹⁸ Code Civ. Proc. § 1438. Setting aside. *Woolworth v. Taylor*, 62 How. Pr. 90; *Miller v. Moeschler*, 12 State Rep. 703, 28 Wkly. Dig. 75.

tion, so far as it affects the rights of purchasers at a sale, is merely directory. It imposes a strict duty on the sheriff, a failure to perform which subjects him to any costs or expenses necessary to compel his performance; but his neglect does not invalidate the proceedings between the parties nor prejudice the rights of the purchaser.⁶¹⁹ The recitals in the certificate of sale are not evidence of the issuance of the execution.⁶²⁰ The whole bid should be stated in the certificate.⁶²¹ The certificate is amendable.⁶²²

The sheriff must, within ten days after the sale, file one of the duplicate certificates, in the office of the clerk of the county, and deliver another to the purchaser. If there are two or more purchasers, a certificate must be delivered to each. The clerk must immediately record the certificate in a book, kept by him for that purpose, and must index the record, to the name of the judgment debtor. His fees for so doing must be paid by the sheriff, as part of the expenses of the sale.⁶²³

§ 2255. Title, rights, and liabilities of purchaser.

After payment of his bid, the purchaser acquires certain rights in relation to the property but title is not vested in him until fifteen months have elapsed without a redemption and he thereafter obtains a deed from the sheriff. When title is acquired, however, it relates back to the time of the sale.⁶²⁴ When the purchaser receives a deed, he is in the same position as he would have been if the deed had been executed by the judgment debtor at the time the judgment was docketed.⁶²⁵

⁶¹⁹ Failure to file and deliver is not ground for setting aside sale, but mandamus lies to compel sheriff to perform his duty. *O'Brien v. Hashagen*, 20 Hun, 564. See, also, *Jackson v. Young*, 5 Cow. 269; *Bank of Vergennes v. Warren*, 7 Hill, 91.

⁶²⁰ *Goldman v. Kennedy*, 49 Hun, 157, 159, 1 N. Y. Supp. 599.

⁶²¹ *Mascraft v. Van Antwerp*, 3 Cow. 334.

⁶²² *Gansevoort v. Gilliland*, 1 Cow. 218; *Smith v. Hudson*, 1 Cow. 430; *Richards v. Varnum*, 8 How. Pr. 79.

⁶²³ Code Civ. Proc. § 1439.

⁶²⁴ See post, § 2264.

⁶²⁵ *Maroney v. Boyle*, 141 N. Y. 462. But a sale of all the interest the debtor had at the time of the original docketing of the judgment,

The Code provides as follows: "The right and title of the judgment debtor or of a person holding under him or deriving title through him to real property sold by virtue of an execution is not divested by the sale until the expiration of the period within which it can be redeemed * * * and the execution of the sheriff's deed. But if the property is not redeemed and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate from the time of the sale."⁶²⁶ It follows that the purchaser of the interest of a tenant from year to year obtains no title where the interest terminates before the purchaser obtains his deed.⁶²⁷ And inasmuch as the purchaser is not the owner during the period allowed for redemption, he may take an assignment of a mortgage on the property without effecting a merger.⁶²⁸ Conveyances made by the debtor, subsequent to the judgment, do not constitute a cloud on the title of the purchaser.⁶²⁹ Before the acquisition of title, i. e., the obtaining a sheriff's deed, the purchaser cannot sue one not a party to the action,⁶³⁰ but he may, after the expiration of a year, sue to cancel a cloud on the title.⁶³¹

The rule of caveat emptor applies to an execution sale.⁶³² Without express authority, the sheriff cannot warrant the title.⁶³³

or any time thereafter, instead of at the time of docketing within the county where the property is, is not necessarily fatal to the title of the execution purchaser. *Clute v. Emmerich*, 21 Hun, 122.

⁶²⁶ Code Civ. Proc. § 1440. Section does not apply to a redeeming creditor. *Gilman v. Tucker*, 128 N. Y. 190, 198. Purchaser has only a lien before expiration of fifteen months. *Bissell v. Payn*, 20 Johns. 3; *Evertsen v. Sawyer*, 2 Wend. 507; *Vaughn v. Ely*, 4 Barb. 159. No title until delivery of deed. *Smith v. Colvin*, 17 Barb. 157; *Farmers' Bank of Saratoga County v. Merchant*, 13 How. Pr. 10.

⁶²⁷ *Bigelow v. Finch*, 17 Barb. 394.

⁶²⁸ *Southworth v. Scofield*, 51 N. Y. 513.

⁶²⁹ *Doody v. Hollwedel*, 22 App. Div. 456, 48 N. Y. Supp. 93.

⁶³⁰ *Blanco v. Foote*, 32 Barb. 535.

⁶³¹ *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

⁶³² *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

⁶³³ *Ball v. Pratt*, 36 Barb. 402.

— **Title acquired.** Generally a purchaser acquires all the title which the defendant had at the time of the docketing of the judgment, including covenants and estoppels which run with the land,⁶³⁴ and an equitable claim to relief from an incumbrance on the land,⁶³⁵ and the right to compel specific performance. But if the judgment is void or has been paid the purchaser takes nothing.⁶³⁶ Even a bona fide purchaser without notice cannot acquire title on a sale under a satisfied judgment.⁶³⁷ So where the process under which the sale is had is subsequently set aside for an irregularity which renders it void, the purchaser takes no title.⁶³⁸ So if, by any valid agreement, the judgment has lost its apparent position as a lien on real estate, the purchaser's right and title is just what the judgment creditor had.⁶³⁹ But the right of a purchaser is not affected by the fact that the execution creditor, previous to the sale, released from the lien of the judgment, other property to which equitably he might have been compelled to resort in the first instance.⁶⁴⁰ A sale of the property of two, as the property of one, makes the purchaser a tenant in common.⁶⁴¹

— **Liabilities.** The purchaser becomes subject, to the same extent as if he had received a conveyance from the defendant in person, to the obligations attaching to the holder of the estate conveyed.⁶⁴² The purchaser takes his title subject to such liens, easements, and equities, as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in good faith and without any notice, actual

⁶³⁴ Sweet v. Green, 1 Paige, 473; Kellogg v. Wood, 4 Paige, 578.

⁶³⁵ Kellogg v. Wood, 4 Paige, 578.

⁶³⁶ McCracken v. Flanagan, 141 N. Y. 174; Frost v. Yonkers Sav. Bank, 70 N. Y. 553.

⁶³⁷ Wood v. Colvin, 2 Hill, 566; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 560.

⁶³⁸ Woodcock v. Bennet, 1 Cow. 711.

⁶³⁹ Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 560.

⁶⁴⁰ Frost v. Koon, 30 N. Y. 428, 448.

⁶⁴¹ Fiero v. Betts, 2 Barb. 633.

⁶⁴² 3 Freeman, Executions, 1936.

or constructive, of such lien, easement, or equity.⁶⁴³ The purchaser is protected as against any unrecorded and unknown lien, such as a vendor's lien.⁶⁴⁴ And matters arising subsequent to the sale, between the parties to the judgment, cannot affect the purchaser.⁶⁴⁵ Knowledge of an agreement, between the parties,⁶⁴⁶ or of an equitable title,⁶⁴⁷ makes the purchaser take subject thereto. So a purchaser with notice takes subject to a prior unrecorded conveyance,⁶⁴⁸ even though the deed is fraudulent.⁶⁴⁹ An attorney who issued the writ, where he becomes the purchaser, is chargeable with notice of all irregularities.⁶⁵⁰ But it seems that a judgment creditor, without fraud, purchasing land sold on his own execution, though paying no money therefor, is a bona fide purchaser in good faith.⁶⁵¹ The burden of showing notice rests on the party seeking to impeach the good faith of the purchaser.⁶⁵²

— **Obtaining possession.** The purchaser, when he receives his deed from the sheriff, is entitled to possession. This possession, unless peaceably relinquished, must be recovered by due process of law. The purchaser cannot enter unless the premises are vacated,⁶⁵³ but the fact that some goods of the former proprietor are left on the premises does not prevent an entry.⁶⁵⁴ After title perfected, the purchaser may dis-

⁶⁴³ See *Beman v. Douglas*, 1 App. Div. 169, 37 N. Y. Supp. 859; *Morgan v. Turner*, 35 Misc. 399, 405, 71 N. Y. Supp. 996; *Sandford v. McLean*, 3 Paige, 117; *Bartlett v. Gale*, 4 Paige, 503; *Averill v. Loucks*, 6 Barb. 19; *Chase v. Peck*, 21 N. Y. 581; *Sisson v. Hibbard*, 75 N. Y. 542; *Jackson v. Hull*, 10 Johns. 481; *Friedrich v. Brewster*, 13 Wkly. Dig. 546; *Lake Kenka Nav. Co. v. Holmes*, 20 Wkly. Dig. 32.

⁶⁴⁴ *Maroney v. Boyle*, 141 N. Y. 462.

⁶⁴⁵ *Jackson v. Bartlett*, 8 Johns. 281.

⁶⁴⁶ *Mason v. Sudam*, 2 Johns. Ch. 172.

⁶⁴⁷ *Ells v. Tousley*, 1 Paige, 280.

⁶⁴⁸ *Lamont v. Cheshire*, 65 N. Y. 30.

⁶⁴⁹ *Snedeker v. Snedeker*, 18 Hun, 355.

⁶⁵⁰ *Simonds v. Catlin*, 2 Caines, 61, *Colem. & C. Cas.* 346.

⁶⁵¹ *Wood v. Morehouse*, 45 N. Y. 368.

⁶⁵² *Beman v. Douglas*, 1 App. Div. 169, 73 State Rep. 72, 37 N. Y. Supp. 859.

⁶⁵³ *People v. Nelson*, 13 Johns. 340.

⁶⁵⁴ *McDougall v. Sitcher*, 1 Johns. 42.

possess a judgment debtor,⁶⁵⁵ or one put in possession by such debtor,⁶⁵⁶ by instituting summary proceedings.⁶⁵⁷ Ejectment may also be maintained.⁶⁵⁸ In ejectment, defendant may show that the judgment under which the sale was made was “void,” or that the execution or any essential proceeding taken thereunder was “void,”⁶⁵⁹ or that the interest of the judgment debtor was not subject to, or was exempt from, execution.⁶⁶⁰ But it is no defense that the debtor had sufficient personal property to satisfy the execution,⁶⁶¹ nor that the title was in another at the time of the sale,⁶⁶² and the regularity of the execution cannot be questioned;⁶⁶³ but one who enters under a judgment debtor subsequent to the issuing of the execution may show a better title in himself or that the judgment or sale was invalid as against him.⁶⁶⁴ The plaintiff should introduce in evidence the judgment,⁶⁶⁵ execution,⁶⁶⁶ and sheriff’s deed.

—**Relief on failure of title.** The purchaser of real property at an execution sale, his heir, devisee, grantee, or assignee, who is evicted from the possession thereof, or against whom judgment is rendered, in an action to recover the same, may recover the purchase-money, with interest, from the per-

⁶⁵⁵ *Brown v. Betts*, 13 Wend. 29.

⁶⁵⁶ *People v. McAdam*, 84 N. Y. 287; *Birdsall v. Phillips*, 17 Wend. 464; *Hallenbeck v. Garner*, 20 Wend. 22.

⁶⁵⁷ *Brown v. Betts*, 13 Wend. 29; *Spraker v. Cook*, 16 N. Y. 567; *Jack v. Cashin*, 1 City Ct. R. 72; *Mitnacht v. Cocks*, 65 How. Pr. 84; *People v. McAdam*, 84 N. Y. 287.

⁶⁵⁸ *Jackson v. Davis*, 18 Johns. 7. Parties to action. *Parshall v. Shirts*, 54 Barb. 99.

⁶⁵⁹ 3 Freeman, Executions, 1999.

⁶⁶⁰ *Colvin v. Baker*, 2 Barb. 206; *Bigelow v. Finch*, 11 Barb. 498; *Harris v. Murray*, 28 N. Y. 574.

⁶⁶¹ *Lathrop v. Singer*, 39 Barb. 396.

⁶⁶² *Jackson v. Graham*, 3 Caines, 188; *Jackson v. Bush*, 10 Johns. 223.

⁶⁶³ *Jackson v. Bartlett*, 8 Johns. 281; *Brown v. Betts*, 13 Wend. 29.

⁶⁶⁴ *Colvin v. Baker*, 2 Barb. 206; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528.

⁶⁶⁵ *Jackson v. Hasbrouck*, 12 Johns. 213; *Townshend v. Wesson*, 11 Super. Ct. (4 Duer) 342. Compare *Jackson v. Miller*, 6 Cow. 751.

⁶⁶⁶ *Neilson v. Neilson*, 5 Barb. 565.

son for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence, either:

1. Of any irregularity in the proceedings concerning the sale; or

2. Of the judgment, upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact.⁶⁶⁷

Where final judgment is rendered, against the defendant, in an action specified in subdivision first of the last section, the judgment, by virtue of which the sale was made, remains, in his favor, valid and effectual against the judgment debtor therein, his executor, administrator, heir, or devisee, for the purpose of collecting the sum paid on the sale, with interest. He may accordingly have a further execution upon that judgment; but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment, or otherwise, whose title or whose incumbrance accrued before the actual levy thereof.⁶⁶⁸

The last sentence of section 1440 of the Code, added by amendment in 1881, has been held unconstitutional on the ground that it deprives the owner of his property without due process of law.⁶⁶⁹ It contained a provision that if the title of the grantee in the sheriff's deed was declared void, in an action brought by the judgment debtor or his assigns, the judgment should be ineffective unless plaintiff, within twenty days, should pay to the grantee the amount bid at the sale with interest.⁶⁷⁰

Money paid in good faith at a sale under a void execution may be recovered of the party procuring the sale if he knew the defects;⁶⁷¹ but knowledge of the invalidity is not im-

⁶⁶⁷ Code Civ. Proc. § 1479.

⁶⁶⁸ Code Civ. Proc. § 1480.

⁶⁶⁹ *Gilman v. Tucker*, 128 N. Y. 190, 199.

⁶⁷⁰ Said section was held not to apply to a fraudulent sale. *McIntyre v. Sanford*, 89 N. Y. 634.

⁶⁷¹ *Schwinger v. Hickok*, 53 N. Y. 280; *Chapman v. City of Brooklyn*, 40 N. Y. 372.

puted in order to make the payment voluntary.⁶⁷² The money may be recovered back by action as distinguished from motion.⁶⁷³

— **Rights of person in possession before purchaser becomes entitled to possession.** The debtor, or his lessee, may continue in possession for fifteen months.⁶⁷⁴ The person entitled to the possession of real property may, during the period in which a redemption is allowed, use and enjoy the same as follows, without being chargeable with committing waste:

1. He may use and enjoy it in like manner, and for the like purposes, as it was used and enjoyed before the sale, doing no permanent injury to the freehold.

2. He may make necessary repairs to a building, or other erection thereupon. But this does not permit an alteration in the form or structure of the building, or other erection.

3. He may use and improve the land, in the ordinary course of husbandry; but he is not entitled to a crop, growing thereon, at the expiration of the period of redemption.

4. He may apply any wood or timber on the land to the necessary reparation of a fence, building, or other erection, which was thereupon at the time of the sale.

5. If he actually occupies the land sold, he may take necessary fire-wood therefrom for use in his household.⁶⁷⁵

§ 2256. Order to prevent waste.

If, at any time during the period allowed for redemption, the judgment debtor, or any other person in possession of the property sold, commits, or threatens to commit, or makes preparations for committing, waste thereupon, the supreme court, or any justice thereof, within the judicial district, or the county judge of the county, in which the property, or any part thereof, is situated, may, upon the application of the purchaser, or his assignee, or the agent or attorney of either,

⁶⁷² *Schwinger v. Hickok*, 53 N. Y. 280.

⁶⁷³ *Kidd v. Curry*, 29 Hun, 215. Relief was formerly in equity. *Lansing v. Quackenbush*, 5 Cow. 38.

⁶⁷⁴ See *Evertsen v. Sawyer*, 2 Wend. 507.

⁶⁷⁵ Code Civ. Proc. § 1441.

Art. VI. Sale of Real Property.—Order to Prevent Waste.

and proof, by affidavit, of the facts, grant, without notice, an order, restraining the wrong-doer from committing waste upon the property.⁶⁷⁶

—**Proceedings to punish violation of order.** If the person, against whom such an order is granted, commits waste in violation thereof, after the service upon him of the order, with a copy of the affidavit upon which it was granted, the court or judge, upon proof, by affidavit, of the facts, may grant an order, requiring him to show cause, at a time and place therein specified, why he should not be punished for a contempt.⁶⁷⁷

—**Punishment.** If, upon the return of the order to show cause, it satisfactorily appears that the person required to show cause has violated the former order, the court or judge may either punish him, as prescribed by law for the punishment of a contempt of a court of record, other than a criminal contempt, or may grant a warrant, directed to the sheriff of the county, reciting the former order, and the violation thereof, and commanding the sheriff to commit the wrong-doer to close confinement, for a term specified therein, not more than one year. A person thus committed cannot be admitted to the liberties of the jail.⁶⁷⁸

—**Discharge of prisoner.** The warrant may be superseded, and the prisoner discharged, by an order, in the discretion of the court or judge committing him, upon his executing, to the person who applied for the warrant, an undertaking, in a sum fixed, and with sureties approved, by the court or judge, to the effect, that he will pay any judgment, which the applicant, or his assignee, or other representative, may recover against him, by reason of any waste theretofore or thereafter committed on the property; and upon his paying to the applicant, for the costs and expenses of the proceedings, a sum, fixed by the court or judge.⁶⁷⁹

⁶⁷⁶ Code Civ. Proc. § 1442.

⁶⁷⁷ Code Civ. Proc. § 1443.

⁶⁷⁸ Code Civ. Proc. § 1444.

⁶⁷⁹ Code Civ. Proc. § 1445.

§ 2257. Contribution.

An action may be brought to compel contribution where the real property of two or more persons is liable to satisfy a judgment, and the whole of the judgment, or more than a due proportion thereof, has been collected, by a sale of the real property of one or more of them by virtue of an execution issued upon the judgment;⁶⁸⁰ or where the heir, devisee, or grantee, of a judgment debtor, having an absolute title to a distinct parcel of real property, sold by virtue of an execution, redeems, as prescribed in section 1458 of the Code, the property sold, or any part or parts thereof separately sold, which include his property.⁶⁸¹ Section 1483 of the Code fixes the order in which the property is liable to contribution and section 1484 provides for the enforcement of contribution by an execution issued on the original judgment. Sections 1485 and 1486 enumerate the necessary steps to preserve the lien of the original judgment, for the purpose of enforcing contribution. It is deemed not necessary to set forth these Code provisions in full. There seems to be no decisions relating thereto notwithstanding they were a part of the Revised Statutes.

ART. VII. SHERIFF'S DEED.

§ 2258. Right to deed.

Immediately after the expiration of fifteen months from the time of sale, except where a redemption has been made on the last day of the fifteen months, and, in that case, immediately after the expiration of twenty-four hours from the last redemption, the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee, or assignee.⁶⁸² The making and delivery of the

⁶⁸⁰ Code Civ. Proc. § 1481.

⁶⁸¹ Code Civ. Proc. § 1482.

⁶⁸² Code Civ. Proc. § 1471.

deed is imposed on the sheriff as an absolute duty, whenever a demand is made, unless he be excused by other matters.⁶⁸³

§ 2259. Power to compel execution of deed.

A conveyance may be compelled on motion of the purchaser,⁶⁸⁴ or by mandamus proceedings.⁶⁸⁵ A delay of thirteen years in making a demand on the sheriff for the execution of the deed does not necessarily constitute such laches as precludes the right to compel the sheriff to execute a deed.⁶⁸⁶ But it seems that the lapse of over twenty years, since the execution of the certificate of sale, before an application for a sheriff's deed, raises a presumption that the judgment debtor had redeemed from the sale and thereby destroyed the validity of the certificate.^{686a}

It is no defense that the sheriff has already executed a deed to another person who has conveyed the premises to a bona fide purchaser,⁶⁸⁷ nor that the sheriff, whose term of office has expired, is not in possession of the official documents and does not remember the facts,⁶⁸⁸ nor that a person not entitled to redeem has deposited the amount of the bid.⁶⁸⁹ Whether the sale was fraudulent will not be tried on a motion to compel the sheriff to execute a deed.⁶⁹⁰ An assignee of the certificate of sale cannot compel a conveyance unless he has filed the assignment, with the certificate of proof or acknowledgment.⁶⁹¹

§ 2260. Who must execute.

Where the sheriff dies, is removed from office, or becomes

⁶⁸³ *People v. Grant*, 61 App. Div. 238, 70 N. Y. Supp. 504; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, 481.

⁶⁸⁴ *People v. Haskins*, 7 Wend. 463.

⁶⁸⁵ *People v. Fleming*, 2 N. Y. (2 Comst.) 484; *People v. Grant*, 61 App. Div. 238, 70 N. Y. Supp. 504.

⁶⁸⁶ *People v. Grant*, 61 App. Div. 238, 70 N. Y. Supp. 504.

^{686a} *Dixon v. Dixon*, 89 App. Div. 603, 85 N. Y. Supp. 609.

⁶⁸⁷ *People v. Fleming*, 2 N. Y. (2 Comst.) 484.

⁶⁸⁸ *People v. Grant*, 61 App. Div. 238, 70 N. Y. Supp. 504.

⁶⁸⁹ *Matter of Eleventh Ave.*, 81 N. Y. 436.

⁶⁹⁰ *Hurd v. Magee*, 3 Cow. 35.

⁶⁹¹ *People v. Ransom*, 2 N. Y. (2 Comst.) 490. See post, § 2261.

otherwise disqualified to act, at any time after making a sale of real property under an execution, his under-sheriff must execute the deed. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the sheriff's successor in office must execute the deed.⁶⁹² If, when the period for redemption expires, a coroner, or a person specially appointed by the court, who has sold real property, by virtue of an execution, is dead, or has been removed, or, in the case of a coroner, if he is no longer in office, the court must, upon the application of a person entitled to a deed, appoint a person to execute the deed accordingly.⁶⁹³ It would seem, by analogy, that the person appointed to execute the deed need not give security.⁶⁹⁴ A deed by a deputy, in the name of the sheriff, is good.⁶⁹⁵

§ 2261. To whom conveyance to be executed.

If any part of the property remains unredeemed by a creditor, it must be conveyed, by the sheriff, to the purchaser upon the sale, except where the certificate of sale has been assigned; in which case, it must be conveyed to the last assignee. Any part or parts of the property sold, which have been redeemed by a creditor, must be conveyed by the sheriff, to the last redeeming creditor, except where he has assigned the certificate of redemption, or has executed any other assignment of his right, title, and interest in the property redeemed by him, in which case, it must be conveyed to the last assignee.⁶⁹⁶ The deed may be executed to a third person where so directed by the person redeeming.⁶⁹⁷

— **Executor or administrator.** Where a person entitled to a deed dies before the delivery of the deed, the sheriff must execute and deliver the deed to his executor or administrator.

⁶⁹² Code Civ. Proc. § 1475.

⁶⁹³ Code Civ. Proc. § 1478.

⁶⁹⁴ Sickles v. Hogeboom, 10 Wend. 562.

⁶⁹⁵ Gorham v. Gale, 7 Cow. 739, 745; Jackson v. Bush, 10 Johns. 223; Jackson v. Davis, 18 Johns. 7.

⁶⁹⁶ Code Civ. Proc. § 1472.

⁶⁹⁷ Merritt v. Jackson, 1 Wend. 46.

Art. VII. Sheriff's Deed.

The property so conveyed must be held, in trust for the use of the heirs or devisees of the decedent, subject to the dower of his widow if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized.⁶⁹⁸ This Code section is imperative in form, and precludes the giving of a sheriff's deed direct to an assignee of the heirs at law of the decedent, notwithstanding many years have passed without a demand for a deed by any administrator.⁶⁹⁹

— **Filing of assignments.** Before an assignee or his executor or administrator is entitled to a deed, each assignment under which the deed is claimed must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated, and must be filed in the office of the clerk of that county.⁷⁰⁰ In other words the sheriff cannot be compelled to give a deed unless such conditions are complied with.⁷⁰¹ But it seems, however, that the Code provision is for the benefit of the sheriff who may waive the protection of the statute so that the title of his grantee will not be affected by the omission to prove and file the assignment of the certificate.⁷⁰²

§ 2262. Contents.

The deed need not recite the judgment or execution under which the sale was made,⁷⁰³ but it is sufficient if it appears that the judgment and execution were the authority under which the sheriff acted.⁷⁰⁴ It must specify the purchaser,⁷⁰⁵ and

⁶⁹⁸ Code Civ. Proc. § 1473; *Reynolds v. Darling*, 42 Barb. 418.

⁶⁹⁹ *Dixon v. Dixon*, 89 App. Div. 603, 607, 85 N. Y. Supp. 609, which reverses the holding in the same case at special term (38 Misc. 652).

⁷⁰⁰ Code Civ. Proc. § 1474.

⁷⁰¹ *People v. Ransom*, 2 N. Y. (2 Comst.) 490.

⁷⁰² *Phillips v. Schiffer*, 64 Barb. 548, 557; *Wood v. Morehouse*, 45 N. Y. 368; *Bank of Vergennes v. Warren*, 7 Hill, 91.

⁷⁰³ *Averill v. Wilson*, 4 Barb. 180; *Jackson v. Pratt*, 10 Johns. 381; *Jackson v. Streeter*, 5 Cow. 529; *Jackson v. Jones*, 9 Cow. 182.

⁷⁰⁴ *Averill v. Wilson*, 4 Barb. 180.

⁷⁰⁵ *Jackson v. Catlin*, 2 Johns. 248.

describe the property with reasonable certainty.⁷⁰⁶ A misstatement in the deed of the day of sale is not fatal where no injury results.⁷⁰⁷ If the deed contains a correct description of the premises, a variance between it and the certificate of sale is not fatal.⁷⁰⁸

The deed must distinctly state, in the granting clause thereof, whose right, title, or interest was sold and is conveyed, without naming, in that clause, any of the other parties to the action; otherwise the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages which the purchaser sustains by the omission, whether he accepts or refuses to accept it.⁷⁰⁹

§ 2263. Amendment, reformation, and cancellation.

Merely formal defects in the deed are amendable.⁷¹⁰ If a deed has been improvidently executed to the purchaser, and a sheriff is subsequently directed to execute a deed to a redeeming creditor, the court will not direct the first deed to be canceled but will leave the creditor to enforce his rights as he shall be advised.⁷¹¹ A creditor who is not, upon his papers,

⁷⁰⁶ *Butler v. Clark*, 29 Abb. N. C. 413, 66 Hun, 444, 50 State Rep. 133, 21 N. Y. Supp. 415. The premises conveyed must, in all cases, be specified with so much precision that, from the description, it can be reduced to certainty. *Simonds v. Catlin*, 2 Caines, 61, *Colem. & C. Cas.* 346. Where two distinct parcels of land equally answer the description contained in the deed, the conveyance will be held inoperative. *Mason v. White*, 11 Barb. 173. Describing the property as "supposed to contain four hundred acres, whereof one hundred was struck off" to the grantee for a certain sum, is too uncertain. *Peck v. Mallams*, 10 N. Y. (6 Seld.) 509. A sheriff's deed describing the premises as "all the lands and tenements of the defendant, situate, lying, and being in the Hardenbergh patent." is void for want of a sufficient description. *Jackson v. Roosevelt*, 13 Johns. 97; *Jackson v. Delancy*, 13 Johns. 536. Construction of particular deeds, see *Mason v. White*, 11 Barb. 173; *Bartlett v. Judd*, 21 N. Y. 200.

⁷⁰⁷ *Holman v. Holman*, 66 Barb. 215, 218.

⁷⁰⁸ *Jackson v. Page*, 4 Wend. 585.

⁷⁰⁹ *Code Civ. Proc.* § 1244.

⁷¹⁰ *Brown v. Betts*, 13 Wend. 29, 33.

⁷¹¹ *People v. Haskins*, 7 Wend. 463, 469.

entitled to redeem, takes nothing by the sheriff's deed, and the deed need not be set aside or canceled by action, before the purchaser, to whom the sheriff has subsequently given a deed, can maintain an action for the possession, against the grantee in the deed given by the sheriff, upon the attempted redemption.⁷¹² The deed may be reformed.⁷¹³

§ 2264. Effect.

The deed extinguishes the lien of junior judgments,⁷¹⁴ or a lease given by the judgment debtor after the sale.⁷¹⁵ Recovery of land by mistake not included in the deed may be enjoined.⁷¹⁶ The deed of a part of the debtor's real property which was sold, precludes a second deed passing the remainder.⁷¹⁷ The deed may be recorded with the same effect as given the recordation of other deeds.⁷¹⁸

— **Estate conveyed.** The deed conveys to the grantee therein the right, title, and interest, which were sold by the sheriff.⁷¹⁹ The deed is treated as if given by the judgment debtor himself. It conveys precisely what he could have conveyed when the judgment was docketed.⁷²⁰ The deed relates back to the time of the sale⁷²¹ and conveys the interest of the debtor at the time of the docketing of the judgment;⁷²² and hence a purchaser from an execution purchaser before the expiration of the time to redeem has the title, where the execution purchaser afterwards obtains the sheriff's deed, as against

⁷¹² Hall v. Thomas, 27 Barb. 55.

⁷¹³ Bartlett v. Judd, 21 N. Y. 200.

⁷¹⁴ Ex parte Stevens, 4 Cow. 133.

⁷¹⁵ Wilson v. Davol, 18 Super. Ct. (5 Bosw.) 619.

⁷¹⁶ De Riemer v. Cantillon, 4 Johns. Ch. 85.

⁷¹⁷ Jackson v. Stiker, 1 Johns. Cas. 284.

⁷¹⁸ Hetzel v. Barber, 69 N. Y. 1, 10.

⁷¹⁹ Code Civ. Proc. § 1471.

⁷²⁰ Hetzel v. Barber, 69 N. Y. 1, 9.

⁷²¹ Jackson v. Dickenson, 15 Johns. 309; Jackson v. Ramsay, 3 Cow. 75. So held where deed was executed by successor of sheriff who executed the certificate of sale, more than forty years thereafter. Dixon v. Dixon, 38 Misc. 652, 78 N. Y. Supp. 255.

⁷²² Lamont v. Cheshire, 65 N. Y. 30.

a subsequent grantee of the execution purchaser.⁷²³ Notwithstanding it is not executed until years after the sale, it takes effect from the time when it might have been demanded.⁷²⁴ A late case holds, however, that while ordinarily the deed relates back, so far as necessary to convey all the title of the debtor at the time of the docketing of the judgment, yet this rule has no application where upwards of forty years have intervened intermediate the giving of the certificate and the deed, the lien in the meantime having ceased on a legal presumption that the judgment itself has been paid.^{724a}

—**Recitals as evidence.** After the deed has been recorded for twenty years in the county where the real estate is situated, it shall be presumptive evidence of the facts therein stated.⁷²⁵ Otherwise, the party claiming title under a sheriff's deed must show a judgment and execution issued thereon. The recitals in the deed are not *prima facie* evidence of the issuing of the execution.⁷²⁶ If the execution can not be found, however, and twenty years have elapsed since the sale, the recitals are *prima facie* evidence of the execution provided it is also shown that the property has been sold by a sheriff for the enforcement of the valid lien thereon of a duly docketed judgment.⁷²⁷ The regularity of proceedings to redeem may be presumed from recitals in the sheriff's deed.⁷²⁸

⁷²³ Holman v. Holman, 66 Barb. 215.

⁷²⁴ Klock v. Cronkhite, 1 Hill, 107; Dumond v. Church, 4 App. Div. 194, 74 State Rep. 176, 38 N. Y. Supp. 557.

^{724a} Dixon v. Dixon, 89 App. Div. 603, 608, 85 N. Y. Supp. 609.

⁷²⁵ Code Civ. Proc. § 1471. This provision applies only to executions issued and sales made after Sept. 1, 1877. Goldman v. Kennedy, 21 Abb. N. C. 362. See, also, Jackson v. Robert's Ex'rs, 11 Wend. 422; Rice v. Davis, 7 Lans. 393; Phillips v. Shiffer, 14 Abb. Pr. (N. S.) 101, 64 Barb. 548, 7 Lans. 347; Sandford v. Roosa, 12 Johns. 162; Stafford v. Williams, 12 Barb. 240.

⁷²⁶ Goldman v. Kennedy, 21 Abb. N. C. 362.

⁷²⁷ Laws 1890, c. 158; Hume v. Fleet, 23 App. Div. 185, 187, 48 N. Y. Supp. 889.

⁷²⁸ Rice v. Davis, 7 Lans. 393.

ART. VIII. REDEMPTION OF REAL PROPERTY.**§ 2265. Nature of Code provisions.**

Statutes permitting the redemption of property from execution sales are partly for the benefit of the defendant and partly for the benefit of persons holding liens against the property acquired from the defendant but existing in subordination to the execution sale.⁷²⁹ The right to redeem is purely statutory, and hence the statutes must be strictly complied with though there are cases where a liberal construction of the statutes has been enforced in furtherance of justice.

§ 2266. Right to redeem as affected by agreements or acts of others.

The sheriff, the purchaser, the judgment creditor, or a redeeming creditor, cannot, by his agreement or other act, in any manner, impair or prejudice the right of any other person to redeem.⁷³⁰

§ 2267. Right to redeem as affected by homestead act.

The right to redeem is not affected by the homestead act, provided the sale was made under judgments docketed prior to the record of the notice of exemption.⁷³¹

§ 2268. Who may redeem.

Roughly classified, a redemption from the purchaser or his assignee may be by the judgment debtor, or by a judgment or mortgage creditor. A redemption from a redeeming creditor may be by another judgment or mortgage creditor.

— **Judgment debtor or his representatives.** The redemption, within a year, may be made, either by the judgment debtor, whose right and title were sold, or by his heir, devisee, or grantee, who has acquired, by inheritance, devise, deed, sale

⁷²⁹ Freeman, Executions, § 314.

⁷³⁰ Code Civ. Proc. § 1461. See *Ford v. Knapp*, 102 N. Y. 135, 139.

⁷³¹ *Rice v. Davis*, 7 Lans. 393.

by virtue of a mortgage or of an execution, or by any other means, an absolute title to the property proposed to be redeemed; or, in a case specified in section 1458 or 1459 of the Code, to a portion thereof.⁷³² The debtor need not redeem in person but may do so by his agent.⁷³³ The right of a judgment debtor, whose title has been sold on execution, to redeem from the sale, is personal, not depending upon the condition of his title; and it continues for the period allowed by law, though he may meanwhile have parted with his title.⁷³⁴ One who has redeemed, but has not received a deed, is not a grantee of the debtor within the statute so as to be able to redeem from a sale under a senior judgment.⁷³⁵ A mortgagee is not a grantee of the debtor.⁷³⁶ A grantee of the debtor may redeem, though no sheriff's certificate was issued to the purchaser, and though the execution was voidable.⁷³⁷

— **Judgment creditor or mortgagee.** Real property which remains, at the expiration of one year after the sale, unredeemed by the person or persons entitled to redeem it, as prescribed in the sections 1446 to 1448 of the Code, may be redeemed, within three months after the expiration of the year, by a creditor, having in his own name, or as executor, administrator, assignee, trustee, or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold.⁷³⁸ A judgment creditor cannot redeem unless his judgment is a lien on the property sold.⁷³⁹ Thus, a

⁷³² Code Civ. Proc. § 1447.

⁷³³ *Livingston v. Arnoux*, 56 N. Y. 507.

⁷³⁴ *Livingston v. Arnoux*, 56 N. Y. 507. Even by assigning to a receiver in a creditor's suit against him. *Elsworth v. Muldoon*, 15 Abb. Pr. (N. S.) 440.

⁷³⁵ *Lathrop v. Ferguson*, 22 Wend. 116.

⁷³⁶ *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501.

⁷³⁷ *Thomas v. Bogert*, 33 Hun, 11.

⁷³⁸ Code Civ. Proc. §§ 1449, 1450. Prior to 1833 a mortgage creditor could not redeem.

⁷³⁹ *Putnam v. Westcott*, 19 Johns. 73; *Merry v. Hallet*, 2 Cow. 497; *Hurd v. Magee*, 3 Cow. 35; *People v. Easton*, 2 Wend. 297; *Matter of Stevens*, 4 Cow. 133.

Art. VIII. Redemption.—Who may Redeem.

creditor whose judgment is docketed after the debtor has made an assignment, cannot redeem, since he acquires no lien on the real estate.⁷⁴⁰ So a judgment creditor whose execution is levied on sufficient personal property to satisfy the judgment⁷⁴¹ or who purchases real property at his own execution sale⁷⁴² cannot redeem from another sale since the lien of his judgment is extinguished. A judgment obtained between the time of the sale and the time fixed for redemption is a lien.⁷⁴³ Judgments or mortgages made by the debtor after his time to redeem has expired, but within the three months, will entitle such creditor to redeem.⁷⁴⁴ A creditor under a senior judgment may redeem from a sale under a junior judgment.⁷⁴⁵ Any judgment creditor having a lien may redeem without reference to priority.⁷⁴⁶ An agreement with the debtor to give time for payment of the judgment,⁷⁴⁷ or the purchaser's act in paying the judgment under which the creditor claims to redeem, without his consent,⁷⁴⁸ or a tender to the sheriff of the amount of the execution,⁷⁴⁹ does not preclude a redemption by a creditor. A judgment confessed expressly to enable a creditor to redeem,⁷⁵⁰ or a justice's judgment, though obtained on attachment, where the transcript is duly filed,⁷⁵¹ is sufficient. The assignee of a judgment may redeem,⁷⁵² though he paid but a small sum for the assignment.⁷⁵³ Where one

⁷⁴⁰ *People v. Bacon*, 99 N. Y. 275.

⁷⁴¹ *Ex parte Lawrence*, 4 Cow. 417.

⁷⁴² *Ex parte Stevens*, 4 Cow. 133; *People v. Easton*, 2 Wend. 297.

⁷⁴³ *Van Rensselaer v. Sheriff of Onondaga County*, 1 Cow. 443; *Van Rensselaer v. Sheriff of Albany*, 1 Cow. 501; *Ex parte Peru Iron Co.*, 7 Cow. 540.

⁷⁴⁴ *Wood v. Rabe*, 96 N. Y. 414.

⁷⁴⁵ *Ex parte Peru Iron Co.*, 7 Cow. 540.

⁷⁴⁶ *Jackson v. Budd*, 7 Cow. 658.

⁷⁴⁷ *Muir v. Leitch*, 7 Barb. 341.

⁷⁴⁸ *People v. Beebe*, 1 Barb. 379.

⁷⁴⁹ *Jackson v. Law*, 5 Cow. 248; *People v. Beebe*, 1 Barb. 379.

⁷⁵⁰ *Snyder v. Warren*, 2 Cow. 518.

⁷⁵¹ *Ex parte Carmichael*, 5 Cow. 17.

⁷⁵² *Van Rensselaer v. Sheriff of Onondaga County*, 1 Cow. 443.

⁷⁵³ *Ex parte Raymond*, 1 Denio, 272. Compare *People v. Bunn*, Hill & D. Supp. 265.

purchases land subject to a judgment and afterwards purchases at the execution sale, the judicial title does not merge in the previous title so as to prevent another judgment creditor from redeeming.⁷⁵⁴ The holding of other security for the judgment debt does not bar the creditor's right to redeem from a junior judgment creditor.⁷⁵⁵

Where a creditor has redeemed, as prescribed in section 1450 of the Code, any other creditor who might have redeemed it from the purchaser, as prescribed in said section, may redeem it from the first redeeming creditor, on complying with the conditions imposed by section 1451 of the Code.

Where the lien of the second redeeming creditor's judgment or mortgage is prior to that of the first redeeming creditor's judgment or mortgage, so that the former redeems without paying the sum specified in the latter's certificate of satisfaction, the latter may, without executing another certificate of satisfaction, again redeem from the former, or from any subsequent redeeming creditor, in a case where he would have been entitled to redeem if his first certificate had not been executed; and he has the same rights, with respect to any creditor redeeming from him, as if his certificate had been executed when he made his second redemption.⁷⁵⁶ This last Code provision, according to Mr. Throop, was prepared in order to avoid a possible injustice in the working of the scheme to require a redeeming creditor to satisfy part of his debt. If he holds a junior lien, he will naturally expect to pay the senior lien, and will frame his certificate of satisfaction accordingly: but if he chances to redeem before the holder of the senior lien and the latter afterwards redeems from him, the certificate will impair both his right to redeem and his right to enforce his debt, unless he has the protection which this section gives him.

A third or other creditor, who might have redeemed, as prescribed in sections 1449 to 1452 of the Code, may redeem from the second or any other creditor, who has redeemed, in the

⁷⁵⁴ *Chautauque County Bank v. Risley*, 19 N. Y. 369.

⁷⁵⁵ *Muir v. Leitch*, 7 Barb. 341.

⁷⁵⁶ Code Civ. Proc. § 1452.

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manner, and upon the terms and conditions, prescribed in sections 1451 and 1452 of the Code.⁷⁵⁷

If the purchaser is also a creditor of the judgment debtor, and as such could redeem from a purchaser, or a redeeming creditor, he may avail himself of his judgment or mortgage, to redeem from any other redeeming creditor.⁷⁵⁸

The judgment creditor, by virtue of whose execution real property has been sold, cannot avail himself of the judgment, upon which the execution was issued, to redeem the property; nor, except as otherwise specially prescribed, can a creditor, who has once redeemed, avail himself of the same judgment or mortgage, to redeem again. But if either has another judgment or mortgage, which would entitle him to redeem, he may avail himself thereof for that purpose in the same manner and on the same terms as any other creditor.⁷⁵⁹ The execution creditor cannot redeem by virtue of the judgment on which the execution is issued,⁷⁶⁰ though the purchase money was wholly applied to prior executions;⁷⁶¹ but, as to any other judgments he holds, he has the same rights as any other creditor;⁷⁶² and, where he purchases at his own sale, he cannot redeem as a creditor on a sale under a "prior" judgment.⁷⁶³

— **Redemption by person entitled to redeem only part.** Where a person who has an absolute title to, or a judgment or mortgage which is a lien upon, a distinct parcel only of the real property, sold by virtue of an execution, would be authorized to redeem the property, if his title or lien extended to the whole, he may redeem, from a purchaser, the entire property sold, or from a prior redeeming creditor, the entire property redeemed by that creditor; except that if his title or lien extends to a distinct parcel only of one or more parts of the

⁷⁵⁷ Code Civ. Proc. § 1453.

⁷⁵⁸ Code Civ. Proc. § 1456.

⁷⁵⁹ Code Civ. Proc. § 1457.

⁷⁶⁰ *People v. Baker*, 20 Wend. 602; *People v. Fleming*, 2 N. Y. (2 Comst.) 484.

⁷⁶¹ *Ex parte Paddock*, 4 Hill, 544.

⁷⁶² *People v. Fleming*, 4 Denio, 137.

⁷⁶³ *Russell v. Allen*, 10 Paige, 249.

property, which were separately sold, he can redeem, from a purchaser, only the part or parts thus separately sold, in which his distinct parcel is included.⁷⁶⁴ This Code provision excludes a second redeeming creditor from the right to redeem from the first redeeming creditor a distinct parcel of the property unless the latter has himself redeemed such distinct parcel.

Where two or more persons own undivided shares, as joint tenants or as tenants in common, in the property sold, or in a distinct parcel thereof which has been separately sold, each of them may redeem the share or interest belonging to him.⁷⁶⁵ So where the judgment or mortgage of a creditor, entitled to redeem, is a lien on such an undivided share, he may redeem that undivided share from a purchaser, or he may redeem from a prior redeeming creditor the entire property redeemed by the latter as if his lien attached to the whole.⁷⁶⁶

§ 2269. Time.

If the redemption is made by the judgment debtor whose right and title was sold, or by his assigns or representatives, it must be made within one year after the sale.⁷⁶⁷ Judgment or mortgage creditors may redeem within three months after the expiration of the year if the debtor has not redeemed within the year.⁷⁶⁸ A creditor, who might have redeemed within fifteen months after the sale, as prescribed in sections 1450 to 1453 of the Code, may redeem from any other redeeming creditor, although the fifteen months have elapsed, provided he redeems within twenty-four hours after the last previous redemption.⁷⁶⁹ The rules as to the computation of

⁷⁶⁴ Code Civ. Proc. § 1458. Right to contribution, see Id. § 1482.

⁷⁶⁵ Code Civ. Proc. § 1459. See *People v. Bunn*, Hill & D. Supp. 265.

⁷⁶⁶ Code Civ. Proc. § 1460.

⁷⁶⁷ Code Civ. Proc. § 1446. This applies equally well to an equitable owner. *Russell v. Allen*, 10 Paige, 249.

⁷⁶⁸ Code Civ. Proc. § 1449; *Van Rensselaer v. Sheriff of Onondaga County*, 1 Cow. 443; *People v. Sheriff of Broome*, 19 Wend. 87; *Morss v. Purvis*, 68 N. Y. 225. Calendar and not lunar months are meant. *Snyder v. Warren*, 2 Cow. 518.

⁷⁶⁹ Code Civ. Proc. § 1454.

time have been considered in a preceding volume.⁷⁷⁰ It has been held that when the last day falls on Sunday, the redemption must be on the day before.⁷⁷¹ On the other hand, it has been held that when a judgment or mortgage creditor redeems on a Saturday, the twenty-four hours limitation within which another creditor may redeem does not preclude a redemption on Monday.⁷⁷² The time for redemption under a sale on a second judgment is not affected because a previous sale was made under a judgment subsequently reversed.⁷⁷³ After the time for redemption has expired, the court cannot interfere to allow it.⁷⁷⁴

An agreement enlarging the time to redeem is valid, in so far as the parties to the agreement are concerned,⁷⁷⁵ but cannot affect the rights of third persons to redeem.⁷⁷⁶

§ 2270. Amount necessary to redeem.

The amount required to redeem depends on whether the redemption is by the debtor, a creditor, or by a creditor redeeming from another redeeming creditor.

— **Redemption by judgment debtor or his representatives.** There must be paid the sum paid upon the sale, with interest

⁷⁷⁰ Volume 1, p. 694. That day of sale is to be excluded, see *Snyder v. Warren*, 2 Cow. 518.

⁷⁷¹ *People v. Luther*, 1 Wend. 42.

⁷⁷² *Porter v. Pierce*, 120 N. Y. 217.

⁷⁷³ *Carlson v. Winterson*, 147 N. Y. 652, 657.

⁷⁷⁴ Where a person with full knowledge of all the facts, but through a mistaken belief that his interest in real estate was not subject to sale on execution, has lost his title through a regular sale, judgment, and execution, and a conveyance by the sheriff to the purchaser pursuant to the sale after the time for redemption has expired, the court has no power to permit redemption. *Weed v. Weed*, 94 N. Y. 243.

⁷⁷⁵ *Miller v. Lewis*, 4 N. Y. (4 Comst.) 554.

⁷⁷⁶ Code Civ. Proc. § 1461. This Code provision overrules *Miller v. Lewis*, 4 N. Y. (4 Comst.) 554, in so far as it holds that where there is a valid agreement between the judgment debtor whose land has been sold on execution and the purchaser, postponing the time within which the debtor can redeem, a creditor by judgment obtained subsequent to such agreement, though within fifteen months from the sale, cannot redeem.

from the time of the sale, at the rate of ten per centum a year.⁷⁷⁷

Where two or more persons own undivided shares, as joint tenants or as tenants in common in real property sold by virtue of an execution, or in a distinct parcel thereof which has been separately sold, each of them may redeem, from the purchaser, as prescribed in sections 1446 and 1447 of the Code, the share or interest belonging to him, by paying a part of the purchase money bid for the property or for that distinct parcel thereof bearing the same proportion to the whole as the share or interest proposed to be redeemed bears to the property or distinct parcel separately sold, of which it is a part, together with interest on the sum so paid, from the time of the sale at the rate of ten per centum a year.⁷⁷⁸

— **Redemption by judgment creditor or mortgagee.** The sum paid on the sale, with seven per cent interest from the time of the sale, must be paid by the redeeming creditor.⁷⁷⁹ This rule is applicable as between an assignee of a sheriff's certificate of sale and the assignee of a subsequent judgment creditor seeking to redeem, notwithstanding the purchaser at the execution sale was the prior judgment creditor himself and the amount bid exceeded the indebtedness on the judgment.⁷⁸⁰

Where a judgment or mortgage creditor who has a lien upon an undivided share owned by a joint tenant or tenant in common, sold under an execution, redeems from a purchaser that undivided share, he must pay him the same proportion of the purchase-money which the owner must have paid to redeem it, as prescribed in section 1459 of the Code.⁷⁸¹

— **Redemption by creditor from redeeming creditor.** He must reimburse to the first redeeming creditor, his executor, administrator, or assignee, the sum paid by him to redeem the property, with interest at the rate of seven per centum a year, from the time of his redemption. If the judgment or

⁷⁷⁷ Code Civ. Proc. § 1446.

⁷⁷⁸ Code Civ. Proc. § 1459.

⁷⁷⁹ Code Civ. Proc. § 1450.

⁷⁸⁰ *Youmans v. Terry*, 32 Hun, 624.

⁷⁸¹ Code Civ. Proc. § 1460.

mortgage by virtue of which the first creditor redeemed is prior to the judgment or mortgage of the second creditor, the second creditor must also pay to the first creditor the sum specified in the certificate of satisfaction executed by him upon his redemption, with interest at the rate of seven per centum a year from the time of his redemption; unless the first redeeming creditor's judgment or mortgage had ceased, when he redeemed, to be a lien as against the second redeeming creditor, in which case, the latter need not pay any part of the sum, specified in the certificate.⁷⁸² Where a junior judgment creditor has redeemed, a prior judgment creditor, who redeems from him, need not pay such junior judgment.⁷⁸³ If a junior creditor has redeemed, a senior creditor who had taken a transfer of the certificate of sale, upon presenting it and proper proof of his judgment, need not pay the original purchase money to the sheriff.⁷⁸⁴ As assignee of a sheriff's certificate of sale, a judgment creditor merely occupies the place of the original purchaser, and gains no preference for his judgment so that the interest thus acquired may be purchased by another judgment creditor without paying any part of the judgment of the assignee of the certificate.⁷⁸⁵

§ 2271. Certificate of satisfaction.

A judgment or mortgage creditor, in addition to paying the amount of the bid with interest, must execute a certificate of satisfaction.⁷⁸⁶ A creditor who redeems from a redeeming

⁷⁸² Code Civ. Proc. § 1451. Tender of original bid, with interest, is insufficient. *Ex parte Ives*, 1 Hill, 639. Junior judgment creditor cannot redeem without payment of prior mortgage under which redemption was had. *People v. Ransom*, 2 Hill, 51; followed in *Ex parte Newell*, 4 Hill, 608. Judgments not properly authenticated need not be paid. *Rice v. Davis*, 7 Lans. 393.

⁷⁸³ *Rosekrans v. Hughson*, 1 Cow. 428.

⁷⁸⁴ *People v. Ransom*, 2 Hill, 51; *Ex parte Newell*, 4 Hill, 608; *People v. Muzzy*, 1 Denio, 239.

⁷⁸⁵ *People v. Ransom*, 4 Denio, 145.

⁷⁸⁶ Code Civ. Proc. § 1450.

creditor must also execute a certificate of satisfaction relating to his judgment or mortgage.⁷⁸⁷

— **Contents, filing, etc.** The certificate of satisfaction required to be executed by a creditor in order to effect a redemption of real property must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county; must describe, with reasonable certainty, the judgment or mortgage under which he redeems, and specify the sum due thereupon; and must state that the redemption satisfies the judgment or mortgage, in full, or to a specified amount. It must be filed in the county clerk's office, at or before the time when the money is paid to effect the redemption, unless the money is paid to the sheriff, in which case, the certificate must also be delivered at the time of the payment to the sheriff, who must file it in the county clerk's office, as prescribed in section one thousand four hundred and sixty-seven of the Code. The county clerk, immediately after the execution and recording of the deed, must enter in his docket the satisfaction or partial satisfaction of a judgment specified in a certificate so filed, as required by law, when a judgment is collected, by virtue of an execution. If a mortgage, specified in the certificate, is recorded in his office, he must cancel and discharge the mortgage of record, if it is satisfied by the certificate; or, if it is only partially satisfied, he must make a minute of the partial satisfaction, upon the record thereof. If the property mortgaged is situated in a county in which there is a register, the county clerk must transmit a certified copy of the certificate to the register, who must, in like manner, cancel and discharge the mortgage of record, or make a minute of the partial satisfaction thereof. The clerk's and register's fees, for performing the services specified in this section, must be paid by the sheriff, who may require the person entitled to a deed to pay him the amount thereof, before the deed is delivered.⁷⁸⁸

This Code section was not embraced in the old Code. It

⁷⁸⁷ Code Civ. Proc. § 1451, subd. 2. But a second certificate need not be executed where a junior lienor who has first redeemed afterwards redeems from the second redeeming creditor. Code Civ. Proc. § 1452.

⁷⁸⁸ Code Civ. Proc. § 1463. See *Benton v. Hatch*, 122 N. Y. 322.

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was prepared, according to Mr. Throop, to remove the injustice and inconsistency of allowing a creditor to redeem, under a judgment or a mortgage, without impairing his right to collect the whole of his debt from the other property of the debtor.

— Form of certificate of satisfaction of judgment.

[Title of cause.]

I, ———, do hereby certify that a certain judgment rendered in the above-entitled action in favor of ——— and against ——— for the sum of ——— dollars, of which I am now the owner, and entered in the ——— county clerk's office on the ——— day of ———, 190—, on which is due the sum of ——— dollars, is satisfied in full by the redemption made by virtue thereof by me from a sale made under an execution against the property of ——— by the sheriff of ——— county of certain premises situated in said county, described in a certificate of sale, recorded in ——— county clerk's office, in book ———, at page ———, on the ——— day of ———, 190—.

[Date.]

[Signature.]

[Acknowledge, or prove, and certify, in like manner as a deed to be recorded in the county.]

§ 2272. Payment.

The payment to effect a redemption must be in cash, unless the purchaser agrees to receive something else.⁷⁸⁹ Payment by a check is not good unless it is presented and paid before the expiration of the time for redeeming.⁷⁹⁰ The payment is effectual though the payor immediately serves an injunction, staying it in the sheriff's hands,⁷⁹¹ or though he gives immediate notice to the sheriff not to pay over a portion of it.⁷⁹²

— **Short payment.** A short payment, though by mistake, does not effect a redemption,⁷⁹³ though otherwise if caused by a miscalculation of the sheriff's special agent.⁷⁹⁴ A trivial

⁷⁸⁹ Stone v. Smith, 2 How. Pr. 117.

⁷⁹⁰ People v. Baker, 20 Wend. 602.

⁷⁹¹ Ex parte Newell, 4 Hill, 589.

⁷⁹² Spraker v. Cook, 16 N. Y. 567.

⁷⁹³ Dickenson v. Gilliland, 1 Cow. 481; Ex parte Peru Iron Co., 7 Cow. 540; Hall v. Fisher, 1 Barb. Ch. 53.

⁷⁹⁴ Hall v. Fisher, 1 Barb. Ch. 53; Id., 3 Barb. Ch. 637; Id., 9 Barb. 17.

deficiency may, however, be disregarded.⁷⁹⁵ A subsequent payment of the deficiency is ineffectual.⁷⁹⁶

— **Place of payment.** A redemption made by a creditor on or after the last day of the fifteen months must be made at the sheriff's office of the county.⁷⁹⁷ A redemption cannot lawfully be made elsewhere.⁷⁹⁸ There are no limitations as to where a redemption made before such time must be made, and it has been held that it may be made out of the county where the premises were situated and sold.⁷⁹⁹

— **To whom to be made.** If the debtor or his representative redeems, the payment must be made to the purchaser, his executor, administrator, or assignee, or to the sheriff who made the sale, for the use of the person entitled thereto.⁸⁰⁰ If the payment is by a creditor, it may be made to the purchaser or creditor, from whom the property is to be redeemed, his executor, administrator, or assignee; or it may be paid, for the use of the person so entitled thereto, to the sheriff who made the sale.⁸⁰¹

Where real property is sold, by virtue of an execution, by the under-sheriff or a deputy-sheriff, in behalf of the sheriff, money required to be paid, or a paper required to be delivered, to the sheriff in order to effect a redemption, at any time before the last day of the fifteen months from the time of the sale, may be paid or delivered, either to the sheriff, or to the under-sheriff or deputy-sheriff who made the sale.⁸⁰²

Where a sheriff dies, is removed from office, or becomes

⁷⁹⁵ Hall v. Fisher, 9 Barb. 17, where purchaser was held to be estopped from asserting any claim.

⁷⁹⁶ Ex parte Raymond, 1 Denio, 272.

⁷⁹⁷ Code Civ. Proc. § 1455; Gilchrist v. Comfort, 34 N. Y. 235; People v. Lynch, 68 N. Y. 473.

⁷⁹⁸ Morss v. Purvis, 68 N. Y. 225; Porter v. Pierce, 120 N. Y. 217, 221.

⁷⁹⁹ Rice v. Davis, 7 Lans. 393, 403.

⁸⁰⁰ Code Civ. Proc. § 1446.

⁸⁰¹ Code Civ. Proc. § 1462; People v. Baker, 20 Wend. 602.

⁸⁰² Code Civ. Proc. § 1476. This provision is declaratory of the rule under the original statute. Livingston v. Arnoux, 56 N. Y. 507. See, also, People v. Lynch, 68 N. Y. 473.

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otherwise disqualified to act, at any time after making a sale of real property, by virtue of an execution, the property, or a distinct parcel thereof, may be redeemed by paying the necessary money and delivering the necessary papers to his under-sheriff. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the property may be redeemed by paying the necessary money and delivering the necessary papers to the sheriff's successor in office.⁸⁰³

Where a redemption is made by a creditor, on or after the last day of the fifteen months, at the sheriff's office of the county, the sheriff, or his under-sheriff, or a deputy-sheriff, in his behalf, must attend at the sheriff's office, for that purpose, on the last day of the fifteen months, and on each day thereafter, in which a redemption can be made, during the time when the sheriff's office is required by law to be kept open. In the absence of the sheriff, the redemption may be made by paying the necessary money and delivering the necessary papers to the under-sheriff or to any deputy-sheriff present at the sheriff's office. If the term of office of the sheriff who made the sale has expired, and he, or his under-sheriff, or a deputy-sheriff authorized in his behalf to receive the necessary money and the necessary papers is not present, the money may be paid and the papers may be delivered to the sheriff then in office or to the under-sheriff or a deputy-sheriff of the latter.⁸⁰⁴

Where real property is sold, by virtue of an execution, by a person specially appointed by the court, as prescribed in section 1362 or section 1388 of the Code, it may be redeemed as if it had been sold by the sheriff, except as follows: "Money, required to be paid, or a paper, required to be delivered, to the sheriff, in order to effect a redemption, at any time before the

⁸⁰³ Code Civ. Proc. § 1475.

⁸⁰⁴ Code Civ. Proc. § 1455. The provisions of this section apply to a redemption made on a sale by a person specially appointed by the court, as prescribed in section 1362 or 1368 of the Code; and the officer, who sold the property, must attend, as the sheriff is therein required to attend. If he is not present, the redemption may be effected, as prescribed in that section, for redemption in a case, where the term of office of the sheriff, who made the sale, has expired.

last day of the fifteen months from the time of the sale, must be paid to the officer who made the sale, unless the person entitled to redeem, his agent or attorney, files with the clerk of the county, with the paper or papers required to be filed, or to be delivered to the sheriff, for the purpose of effecting the redemption, his affidavit, to the effect that the officer is dead, or has been removed, or, where he is a coroner, that he is no longer in office; or that after diligent search, the affiant has been unable to find him within the county, in which case the money may be paid into court, by paying it to the county treasurer, to the credit of the cause, with like effect, as where it is paid to the sheriff, after a sale by the latter.⁸⁰⁵

The officer who made the sale may appoint an agent to receive the redemption money,⁸⁰⁶ but payment should not be to the county clerk in the absence of the sheriff and his deputies, where the clerk has no special authority from the sheriff.⁸⁰⁷

§ 2273. Evidence to be furnished by redeeming judgment creditor.

In order to entitle a creditor by judgment to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office or deliver to the sheriff as the case requires, the following evidence of his right:

1. A copy of the docket of the judgment, under which he claims the right to redeem, duly certified by the county clerk.

2. Each assignment of the judgment, which is necessary to establish his right. An assignment so filed or delivered must be acknowledged or proved, and certified, in like manner as a deed to be recorded, or the execution thereof must be proved by the affidavit of the creditor or of a witness thereto unless it has been filed and entered, as prescribed in article three of title one of chapter eleven of the Code, in which case a certified copy thereof must be filed or delivered.

3. An affidavit, made by him, or his attorney or agent, stat-

⁸⁰⁵ Code Civ. Proc. § 1477.

⁸⁰⁶ Hall v. Fisher, 9 Barb. 17.

⁸⁰⁷ People v. Rathbun, 15 N. Y. 528.

ing truly the sum remaining unpaid on the judgment, at the time of claiming the right to redeem.⁸⁰⁸

If the person, proposing to redeem, claims to be entitled so to do, by reason of his being an executor or administrator of a person, who, if living, would be entitled to redeem, he must file or deliver, with the other papers therein prescribed, a certified copy or a sworn copy of his letters testamentary, or letters of administration.⁸⁰⁹ Of course, where the judgment, mortgage or assignment is in the name of the executor or administrator, there is no reason for requiring proof of his representative character. While it seems that informalities in the papers may be waived, as by acceptance of the redemption money by the purchaser,⁸¹⁰ there can be no waiver of these requirements as against a person entitled subsequently to redeem.⁸¹¹

Notice that the evidence must be filed or delivered “when he redeems” so as to preclude the furnishing of such evidence after the redemption.

— **Copy of docket of judgment.** A certified copy of the docket of his judgment must be presented by the redeeming judgment creditor.⁸¹² The certificate need not be under seal nor dated.⁸¹³ The copy of the docket is insufficient where not signed by the county clerk or by any one in his behalf, especially where the name of the clerk does not appear in the beginning of the certificate.⁸¹⁴ But it is sufficient, so far as the debtor is concerned, that one of several judgments under which the creditor purports to redeem was properly certified. Other

⁸⁰⁸ Code Civ. Proc. § 1464.

⁸⁰⁹ Code Civ. Proc. § 1466; overruling *People v. Fleming*, 2 N. Y. (2 Comst.) 484.

⁸¹⁰ *Bank of Vergennes v. Warren*, 7 Hill, 91.

⁸¹¹ Code Civ. Proc. § 1468; *People v. Ransom*, 2 N. Y. (2 Comst.) 490. This overrules decision in *Wood v. Morehouse*, 45 N. Y. 368, which held that the sheriff could waive recording of the assignment of the certificate of sale.

⁸¹² See *Waller v. Harris*, 20 Wend. 555; *Brackett v. Miller*, 24 Hun, 560.

⁸¹³ *People v. Ransom*, 2 Hill, 51, 54.

⁸¹⁴ *Brackett v. Miller*, 24 Hun, 560.

judgments not so certified, and the reference to them in the affidavit, may be disregarded as unnecessary.⁸¹⁵ Where a judgment was recovered in one county and docketed in another county, producing a copy of the docket in the latter county is sufficient.⁸¹⁶

— **Assignments of judgment.** If each assignment, not filed, is not acknowledged or proved, and certified in like manner as a deed to be recorded, proof of the execution of the assignment must be by the affidavit of the creditor or of a witness thereto.⁸¹⁷ If the affidavit is made by a witness it must be by a subscribing witness, if there is one;⁸¹⁸ if there is no subscribing witness, it may be verified by the affidavit of any one who saw it executed and delivered.⁸¹⁹ Slight variations in the verification of the assignments are not fatal.⁸²⁰ A person on whom title devolves by the death of another, such as the surviving member of a partnership, need not prove an assignment.⁸²¹

— **Form of verification of assignment of judgment.**

[Venue.]

A. X., being duly sworn, says that he was present when the foregoing assignment of judgment was executed by ——— to ———, and saw said ——— whom he knew to be the person described in and who executed said assignment, execute and deliver the same.

[Jurat.]

[Signature.]

— **Affidavit as to amount due.** The affidavit must state truly the sum remaining unpaid on the judgment at the time of claiming the right to redeem.⁸²² It has been held that the affidavit as to the amount due may be made before the expira-

⁸¹⁵ Rice v. Davis, 7 Lans. 393.

⁸¹⁶ Woolsey v. Saunders, 3 Barb. 301.

⁸¹⁷ Hall v. Thomas, 27 Barb. 55.

⁸¹⁸ Ex parte Aldrich, 1 Denio, 662.

⁸¹⁹ People v. Fleming, 2 N. Y. (2 Comst.) 484.

⁸²⁰ Rice v. Davis, 7 Lans. 393. Sufficiency of affidavit, see Aylesworth v. Brown, 10 Barb. 167; Matter of Newell, 4 Hill, 612.

⁸²¹ Nehrboss v. Bliss, 88 N. Y. 600.

⁸²² See People v. Covell, 18 Wend. 598; People v. Sheriff of Broome, 19 Wend. 87; Hall v. Thomas, 27 Barb. 55.

tion of the year, i. e., before the time has arrived when the creditor has a right to redeem.⁸²³ An affidavit as to the amount due on the judgment, made in good faith, is sufficient although the amount is innocently overstated.⁸²⁴ An affidavit stating a certain amount to be due “as claimed by this deponent” is insufficient,⁸²⁵ but a statement that “there is unpaid on the mortgage, as near as he can estimate,” a specified sum, is sufficient.⁸²⁶ An affidavit on belief, where made by an agent, is insufficient.⁸²⁷ The affidavit may be made by the redeeming creditor, or his attorney or agent.⁸²⁸ One who recovers judgment as survivor of a partnership may make the affidavit,⁸²⁹ and a similarity of names of the one recovering the judgment and the one making the affidavit is *prima facie* evidence of identity.⁸³⁰

— Form of affidavit of amount due on judgment.

[Venue.]

A. X., being duly sworn, says:

I. That he is ——— of the judgment mentioned in the foregoing copy of docket of judgment.

II. That there remains unpaid to ———, the sum of ———.

[Jurat.]

[Signature.]

§ 2274. Evidence to be furnished by redeeming mortgage creditor.

In order to entitle a creditor by mortgage to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, the following evidence of his right:

⁸²³ *People v. Ransom*, 2 Hill, 51; followed in *Ex parte Newell*, 4 Hill, 608.

⁸²⁴ *Muir v. Leitch*, 7 Barb. 341. *Contra*, *Smith v. Miller*, 25 N. Y. 619.

⁸²⁵ *People v. Becker*, 20 N. Y. 354.

⁸²⁶ *People v. Clarke*, 37 Hun, 201.

⁸²⁷ *Ex parte Bank of Monroe*, 7 Hill, 177.

⁸²⁸ Code Civ. Proc. § 1463, subd. 3.

⁸²⁹ *Nehrboss v. Bliss*, 88 N. Y. 600.

⁸³⁰ *Nehrboss v. Bliss*, 13 Wkly. Dig. 168.

1. A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk or register of the county.

2. Each assignment of the mortgage, which is necessary to establish his right, acknowledged or proved, and certified, as prescribed in the last section for an assignment of a judgment, unless it has been recorded; in which case a certified copy of the record must be filed or delivered.

3. An affidavit, made by him, or by his attorney or agent, stating truly the sum remaining unpaid on the mortgage, at the time of claiming the right to redeem.⁸³¹

If the person proposing to redeem claims to be entitled to do so by reason of being an executor or administrator, section 1466 of the Code, as set forth in the preceding section, applies.

§ 2275. Duty of sheriff as to custody of redemption papers.

The sheriff to whom one or more papers are delivered must keep them open, at all reasonable times during the period allowed for redemption, to the inspection of all persons interested. He must have all those papers at the sheriff's office, at the times when he is required to attend thereat, for the purpose of enabling creditors to redeem, as prescribed by law; and he must file them in the county clerk's office, within three days after the execution of the deed.⁸³²

§ 2276. Waiver of objections.

Defects in an attempted redemption may be waived by the execution purchaser, as by the acceptance of the money,⁸³³ but acceptance of the money from the county clerk and immediately repaying it does not waive the objection that the clerk had no power to receive the money.⁸³⁴ Acceptance of money from a stranger waives the purchaser's right to object that he

⁸³¹ Code Civ. Proc. § 1465. The rules laid down in the preceding section as to sufficiency of the certified copy, and of the affidavit as to the amount due, apply.

⁸³² Code Civ. Proc. § 1467.

⁸³³ Matter of Eleventh Ave., 81 N. Y. 436.

⁸³⁴ People v. Rathbun, 15 N. Y. 528.

had no right to redeem.⁸³⁵ It should be observed, however, as already stated, that no waiver can affect the right of any other person to redeem.

§ 2277. **Certificate of redemption.**

Where a redemption is made, the officer or other person, to whom money is paid, or a paper is delivered, for the purpose of effecting the redemption, must execute and deliver, to the person paying the money or delivering the paper, a certificate, stating all the facts which transpired before him, with respect to the redemption.⁸³⁶ It seems that this section, and the succeeding one, were chiefly intended to provide for the preservation of evidence that the sale has been avoided when a redemption is made by a judgment debtor. The certificate can only be made by the persons named in the statute, and by the one who made the sale, or one lawfully acting in his behalf.⁸³⁷ Under the Revised Statutes, the certificate was *prima facie* evidence of the facts stated therein.

— **Recording.** Such a certificate may be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds, has the same effect, as against subsequent purchasers and incumbrancers, as the recording of a conveyance.⁸³⁸ This section was intended, *inter alia*, to determine who should have the right to a conveyance, when the sheriff had power to convey, but not to change the sheriff's power to convey.⁸³⁹ The omission to have the certificate acknowledged and recorded is immaterial, as between the debtor and a subsequent grantee from the sheriff, where the former was in possession when the latter took his deed, that

⁸³⁵ *Phyfe v. Riley*, 15 Wend. 248.

⁸³⁶ Code Civ. Proc. § 1469. A formal receipt is sufficient. *Livingston v. Arnoux*, 56 N. Y. 507. The certificate should be dated.

⁸³⁷ *Griffin v. Chase*, 23 Barb. 278.

⁸³⁸ Code Civ. Proc. § 1470.

⁸³⁹ *Boyce v. Wight*, 2 Abb. N. C. 163.

being constructive notice, which prevented his being a bona fide purchaser.⁸⁴⁰

§ 2278. When redemption is effected by creditor.

A redemption by a creditor is effected, only when he has paid all the money required to be paid, and filed or delivered all the papers, required to be filed or delivered; and a waiver of any of those requirements is void, as against a person who is entitled subsequently to redeem.⁸⁴¹ This section precludes any waiver affecting a subsequent redeeming creditor.

§ 2279. Effect.

Upon payment being made, by a judgment debtor or his assigns or representatives, the sale of the property redeemed, and the certificates of the sale, as far as they relate thereto, become null and void.⁸⁴² The words "so far as they relate thereto" were inserted in view of a case where only a part of the property is redeemed. Where land has been redeemed by the judgment debtor, one who became a grantee of the judgment debtor before the sale, though after recovery of the judgment, holds free from any incumbrance by reason of such sale, purchase and certificate.⁸⁴³ If land is sold on execution for not enough to satisfy it, and the defendant redeem it, the sale becomes null and the land may be sold again upon the same execution and levy, to satisfy the balance of the judgment, though the return day has passed.⁸⁴⁴ The effect of a redemption by the judgment debtor is to restore a junior judgment, under which the sale was also had, but which was not

⁸⁴⁰ *Livingston v. Arnoux*, 56 N. Y. 507.

⁸⁴¹ *Code Civ. Proc.* § 1468.

⁸⁴² *Code Civ. Proc.* § 1448; *Bowers v. Arnoux*, 23 Super. Ct. (1 J. & S.) 530. So a deed acquired subsequent to the sale becomes void. *Stafford v. Williams*, 12 Barb. 240. It seems to be immaterial that redemption money was paid by third person, where accepted. *Phyfe v. Riley*, 15 Wend. 248.

⁸⁴³ *Boyce v. Wight*, 2 Abb. N. C. 163.

⁸⁴⁴ *Wood v. Colvin*, 5 Hill, 228. The same rule is to be applied where the defendant's grantee redeems. *Titus v. Lewis*, 3 Barb. 70.

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reached in the application of the proceeds, to the same lien which it had before the sale.⁸⁴⁵ A judgment debtor induced to redeem by fraud may recover back the money paid or may affirm the sale.⁸⁴⁶

— **Redemption by creditor.** Where a redemption is effected by a creditor, it vests in him all right, title, and interest, which the purchaser acquired by the sale.⁸⁴⁷ A creditor of one of several tenants in common who redeems acquires that tenant's title.⁸⁴⁸ Redemption by a junior creditor does not extinguish his judgment;⁸⁴⁹ but where a senior judgment creditor redeemed lands sold by a junior creditor and received a sheriff's deed, the land being worth more than the amount paid to redeem and the amount due upon the senior judgment, the judgment thereby became satisfied, and could not be made the basis of a subsequent execution.⁸⁵⁰ A redemption under a satisfied judgment is void.⁸⁵¹

ART. IX. RETURN.

§ 2280. What constitutes.

The return to an execution consists of a brief statement by the officer executing the writ as to his proceedings thereunder, which is usually indorsed on the back of the execution. When so indorsed and the execution filed with the proper clerk, the return is complete. When returnable, the execution must, together with the return thereto, be filed with the clerk, unless otherwise specially prescribed by law.⁸⁵² The return may be by mail unless the officer, making the return in the name of the sheriff, resides in the place where the clerk's office is situ-

⁸⁴⁵ *Bodine v. Moore*, 18 N. Y. 347.

⁸⁴⁶ *Goss v. Mather*, 46 N. Y. 689.

⁸⁴⁷ Code Civ. Proc. § 1468.

⁸⁴⁸ *Neilson v. Neilson*, 5 Barb. 565; *Ford v. Knapp*, 102 N. Y. 135.

⁸⁴⁹ *Emmet's Adm'r's v. Bradstreet*, 20 Wend. 50; *Van Horne v. McLaren*, 8 Paige, 285.

⁸⁵⁰ *Benton v. Hatch*, 122 N. Y. 322.

⁸⁵¹ *Ten Eyck v. Craig*, 62 N. Y. 406.

⁸⁵² Code Civ. Proc. § 23.

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ated.⁸⁵³ The return must be in writing and signed, in the name of the sheriff, by the officer who executes the writ. A return by a deputy, in his own name, instead of in the name of the sheriff, is insufficient.⁸⁵⁴ The land need not be particularly described.⁸⁵⁵

§ 2281. Who may make.

The return should be made by the officer who executed the writ. If he dies or is removed from office or becomes otherwise disqualified to act before making the return, then the person specified in section 1388 of the Code, already set forth,⁸⁵⁶ should make the return.⁸⁵⁷

§ 2282. To whom to be made.

The return must be to the clerk with whom the judgment roll is filed,⁸⁵⁸ except that where an execution is issued out of a court other than that in which judgment was rendered, on filing a transcript, it must be returned to the clerk with whom the transcript is filed.⁸⁵⁹ But a return to the wrong clerk's office is a mere error of form which will not be noticed on the application to set aside the return for irregularity.⁸⁶⁰

§ 2283. Time.

The execution, by its terms, is required to be returned within sixty days after its receipt.⁸⁶¹ If a return *nulla bona* is made in less than sixty days the question as to the propriety thereof may arise either in an action against the sheriff for a false

⁸⁵³ Code Civ. Proc. § 102.

⁸⁵⁴ *Simonds v. Catlin*, 2 Caines, 61, *Colem. & C. Cas.* 346.

⁸⁵⁵ *Jackson v. Walker*, 4 Wend. 462.

⁸⁵⁶ See ante, § 2199.

⁸⁵⁷ Sheriff who has gone out of office cannot make return. *Richards v. Porter*, 7 Johns. 137.

⁸⁵⁸ Code Civ. Proc. § 1366.

⁸⁵⁹ Code Civ. Proc. § 1367.

⁸⁶⁰ *Clark v. Dakin*, 2 Barb. Ch. 36. To same effect, *Ennis v. Broderick*, 45 Super. Ct. (13 J. & S.) 92.

⁸⁶¹ Code Civ. Proc. § 1366.

return or as a defense to a creditor's bill or supplementary proceedings. A return in less than sixty days is not invalid, though made at the request of plaintiff's attorney, unless collusion or an intention to omit to attempt to collect it be shown.⁸⁶² So the court may, on application, compel a return before the expiration of such sixty days; as where there is no property to be levied on, the sheriff will not be prejudiced, and unless so done the delay will injure the execution creditor.⁸⁶³ But if the execution creditor requests the sheriff to make a return *nulla bona* before the expiration of the sixty days, where the debtor has property which could have been reached by execution, a creditor's bill will not lie.⁸⁶⁴ Where a sheriff can find no property to levy on, after a diligent search, he may return the execution *nulla bona* in less than sixty days, and not be liable for a false return, notwithstanding that it is subsequently ascertained that certain property in dispute belonged to the debtor.⁸⁶⁵ Ordinarily, however, a return *nulla bona* before the expiration of sixty days is at the sheriff's risk unless such return is at the request of the execution creditor.⁸⁶⁶ An execution returned unsatisfied will be presumed to have been returned within sixty days.⁸⁶⁷ If the sheriff is stayed from interfering with the property of the judgment debtor, the running of the sixty days is suspended during the continuation of the stay.⁸⁶⁸ But the officer cannot, by his own act, extend the time in which to make a return so as to protect himself against the rights of the execution

⁸⁶² *High Rock Knitting Co. v. Bronner*, 18 Misc. 631, 77 State Rep. 725, 43 N. Y. Supp. 684.

⁸⁶³ *National Exch. Bank v. Burkhalter*, 22 Civ. Proc. R. (Browne) 414, 20 N. Y. Supp. 593.

⁸⁶⁴ Compare *Forbes v. Waller*, 25 N. Y. 430.

⁸⁶⁵ *Cross v. Williams*, 12 Wkly. Dig. 426. And see *Watson v. Brennan*, 66 N. Y. 621; *First Nat. Bank of Rome v. Dering*, 8 Wkly. Dig. 261.

⁸⁶⁶ *Forbes v. Waller*, 25 N. Y. 430, 441.

⁸⁶⁷ *Bean v. Tonnelle*, 24 Hun. 353, 1 Civ. Proc. R. (McCarty) 33.

⁸⁶⁸ *Ansonia Brass & Copper Co. v. Conner*, 103 N. Y. 502. See, also, *People v. Carnley*, 3 Abb. Pr. 215.

creditor.⁸⁶⁹ Failure to make a return within sixty days is waived by the execution creditor where he consents to the retention of the writ by the officer thereafter.⁸⁷⁰ The objection that the execution was returned prematurely is available only on a direct motion on behalf of the debtor to set aside the return.⁸⁷¹

§ 2284. Compelling return.

The general rules of practice expressly provide as to how a return may be compelled.⁸⁷² The court cannot compel a further return showing what goods were sold and the price, to enable defendant to sue the officer.⁸⁷³ The motion may be refused for laches in moving.⁸⁷⁴ An order directing a sheriff to return an execution should not require him to return it "either satisfied or nulla bona."⁸⁷⁵ The sheriff is not relieved from his obligations to make a return by the fact that, prior to the return day, he was served with a warrant of attachment against the plaintiff, granted upon the application of defendant as plaintiff in another action.⁸⁷⁶

§ 2285. Amendment.

An amendment of the return may be ordered by the court to which the return is made.⁸⁷⁷ The amendment may be al-

⁸⁶⁹ See *McGuire v. Bausher*, 52 App. Div. 276, 65 N. Y. Supp. 382.

⁸⁷⁰ *McKinley v. Tucker*, 6 Lans. 214.

⁸⁷¹ *Tyler v. Whitney*, 12 Abb. Pr. 465; *Tyler v. Willis*, 33 Barb. 327; *Fenton v. Flagg*, 24 How. Pr. 499.

⁸⁷² Volume 1, p. 312. See, also, Code Civ. Proc. § 2270. Power is inherent. *Shindler v. Blunt*, 3 Super. Ct. (1 Sandf.) 683. Defendant may move. *Matter of Dawson*, 20 Abb. N. C. 188, 13 Civ. Proc. R. (Browne) 142. Successor in office may be moved against. *Holmes v. Rogers*, 18 State Rep. 652, 2 N. Y. Supp. 501.

⁸⁷³ *Shindler v. Blunt*, 3 Super. Ct. (1 Sandf.) 683.

⁸⁷⁴ *Mills v. Hicks*, 44 Super. Ct. (12 J. & S.) 527.

⁸⁷⁵ *Mollineaux v. Mott*, 78 App. Div. 493, 79 N. Y. Supp. 661.

⁸⁷⁶ *Parker v. Bradley*, 46 Super. Ct. (14 J. & S.) 244.

⁸⁷⁷ Volume 1, p. 706; Code Civ. Proc. § 725; *Williams v. Rogers*, 5 Johns. 163; *Davis v. Weyburn*, 1 How. Pr. 153. Review of court's action can be had only on appeal. *Blumgart v. David*, 1 Month. Law Bul. 71.

lowed even after the commencement of an action for a false return.⁸⁷⁸ Notice of the motion for leave to amend need not be given to one claiming goods under a levy made prior to such return.⁸⁷⁹

§ 2286. Setting aside and cancellation.

A return *nulla bona*, made by mistake, may be set aside *nunc pro tunc* as of the date when made, so as to sustain the validity of the levy as against other creditors.⁸⁸⁰ A return *nulla bona*, where afterwards withdrawn, does not, in an action for conversion, estop the officer from proving that the goods, which were converted by a third person before the return, belonged to the debtor and had been levied on.⁸⁸¹

§ 2287. Conclusiveness.

The sheriff cannot contradict his return⁸⁸² even though made by a deputy in the sheriff's name.⁸⁸³

§ 2288. Effect of failure to make or falsity.

Failure to make a return,⁸⁸⁴ or an incorrect return,⁸⁸⁵ will not invalidate the purchaser's title. Furthermore the omission of the sheriff to file his return with the proper clerk, within the sixty days, is a mere irregularity which will not preclude the issuance of a second execution within five years as of course.⁸⁸⁶

⁸⁷⁸ *People v. Ames*, 35 N. Y. 482.

⁸⁷⁹ *Burnham v. Brennan*, 42 Super. Ct. (10 J. & S.) 49.

⁸⁸⁰ *Lopez v. Campbell*, 163 N. Y. 340; *Burnham v. Brennan*, 42 Super. Ct. (10 J. & S.) 49; *Barker v. Binniger*, 14 N. Y. (4 Kern.) 270; *Flanagan v. Tinin*, 53 Barb. 587, 37 How. Pr. 130. Unauthorized erasure of return not fatal. *James v. Gurley*, 48 N. Y. 163.

⁸⁸¹ *Barker v. Binniger*, 14 N. Y. (4 Kern.) 270.

⁸⁸² *Townsend v. Olin*, 5 Wend. 207.

⁸⁸³ *Sheldon v. Payne*, 7 N. Y. (3 Seld.) 453, 10 N. Y. (6 Seld.) 398.

⁸⁸⁴ *Phillips v. Shiffer*, 14 Abb. Pr. (N. S.) 101, 64 Barb. 548, 7 Lans. 347.

⁸⁸⁵ *Jackson v. Sternbergh*, 1 Johns. Cas. 153.

⁸⁸⁶ *Winebrener v. Johnson*, 7 Abb. Pr. (N. S.) 202.

Art. X. Relief Against Execution.

— **Liability of sheriff.** For a failure to make a proper return of his proceedings, within the time prescribed, the sheriff or other officer to whom the execution is directed and delivered, is liable to the party aggrieved, for the damages sustained by him; in addition to any fine, or other imprisonment or proceeding, authorized by law.⁸⁸⁷ Prima facie the officer is liable for the amount of the judgment but he may show in mitigation of damages that the execution debtor had no property on which the execution could be levied;⁸⁸⁸ but he cannot show that the execution debtor is still solvent and that the debt may be collected by a new execution.⁸⁸⁹ Plaintiff must prove a valid judgment but defendant cannot take advantage of an irregularity therein which renders it voidable though not void.⁸⁹⁰

ART. X. RELIEF AGAINST EXECUTION.**§ 2289. Quashing or setting aside.**

The court from which the execution is issued has inherent power to set aside the writ. Where voidable but not void, the execution is not subject to collateral attack, and can be set aside only by a direct motion.⁸⁹¹ An execution against a receiver can be vacated on the ground that he is an officer of the court, only by a motion for that purpose, with papers served.⁸⁹² The granting of the motion is discretionary. The motion should be made in the action in which the execution is issued,⁸⁹³ except that the motion should be entitled in both causes where the writ was issued without notice, contrary to stipulation between two judgment creditors.⁸⁹⁴ The vacating

⁸⁸⁷ Code Civ. Proc. § 102.

⁸⁸⁸ *Ledyard v. Jones*, 7 N. Y. (3 Seld.) 550; *Pach v. Gilbert*, 17 Civ. Proc. R. (Browne) 399.

⁸⁸⁹ *Ledyard v. Jones*, 7 N. Y. (3 Seld.) 550; overruling *Stevens v. Rowe*, 3 Denio, 327.

⁸⁹⁰ *Forsyth v. Campbell*, 15 Hun, 235.

⁸⁹¹ *Wright v. Nostrand*, 94 N. Y. 32.

⁸⁹² *Harrison v. Wilkin*, 78 N. Y. 390.

⁸⁹³ *Jackson v. Sheldon*, 9 Abb. Pr. 127.

⁸⁹⁴ *Parent v. Kellogg*, 1 How. Pr. 70.

of the judgment vacates the execution.⁸⁹⁵ If the judgment is vacated after the execution is collected, the remedy of the execution debtor is either by motion, under section 1323 of the Code, for an order for the return of the money so paid, or by action to recover it.⁸⁹⁶ Sometimes a motion to quash the execution is joined with a motion to vacate the judgment. The effect of setting aside the sale has already been considered.⁸⁹⁷

— **Grounds.** In connection with the discussion as to the form and contents of an execution certain irregularities have been mentioned as grounds for setting aside the execution on motion. For example, it has been stated that the execution will be set aside where improperly issued, as where issued before entry of the judgment, or without leave of court, or in violation of an agreement not to issue it. It may be stated that the writ will be quashed whenever it is made to appear that it has been improvidently or irregularly issued, or that it is informal or defective in some matter of substance.⁸⁹⁸ But instead of setting aside the execution, the court may allow an amendment of clerical errors or nonprejudicial mistakes,⁸⁹⁹ or may allow, *nunc pro tunc*, in a proper case, the doing of the act, or the grant of a favor, which would make the issuance of the execution regular.⁹⁰⁰ Payment of the judgment is ground for quashing.⁹⁰¹ Informality of the verdict, arising from a mere clerical mistake in its entry;⁹⁰² or a wrong indorsement on the writ as to the sum to be collected, where the writ has been returned *nulla bona*;⁹⁰³ or the opening of the default on which the execution was based, where the new judgment

⁸⁹⁵ *Spaulding v. Lyon*, 2 Abb. N. C. 203.

⁸⁹⁶ *Kidd v. Curry*, 29 Hun, 215.

⁸⁹⁷ See ante, §§ 2246, 2255.

⁸⁹⁸ 8 Enc. Pl. & Pr. 462.

⁸⁹⁹ *Abels v. Westervelt*, 15 Abb. Pr. 230.

⁹⁰⁰ *Frean v. Garrett*, 24 Hun, 161.

⁹⁰¹ *Reed v. Pruyn*, 7 Johns. 426; *Watson v. Fuller*, 6 Johns. 283.

⁹⁰² *Updegroff v. Judges of Niagara County*, 3 Cow. 31.

⁹⁰³ *Barnard v. Darling*, 1 How. Pr. 223. And see *Green v. Beals*, 2 Caines, 254.

was to the same effect as the default;⁹⁰⁴ or an erroneous recital in the execution as to filing of transcript in another county, where it also correctly recites that the judgment roll was filed in the same county:⁹⁰⁵ is not ground for setting aside the execution. The fact that nothing has been collected on an irregular execution and that it will probably be returned *nulla bona* does not prevent its being set aside,⁹⁰⁶ but it is a ground for refusing to set aside that the irregularity in the execution has been cured.⁹⁰⁷ Errors or irregularity in the judgment or in the proceedings prior to judgment, are not grounds unless such as to render the judgment void.

— **Who may move.** Inasmuch as amendable defects can be taken advantage of only by the defendant in the execution,⁹⁰⁸ it would seem that ordinarily the motion cannot be made by one not a party to the action.⁹⁰⁹ Thus, it has been held that a mere mortgagee of the judgment debtor cannot move to set aside an execution against the land mortgaged.⁹¹⁰ But a party may be estopped to claim that the opposing party has no interest to enable him to move to set aside the execution.⁹¹¹

— **Time for motion.** The motion may be denied because of laches in moving,⁹¹² though it seems that the motion may be made after the return of the execution.⁹¹³

— **Notice of motion.** Notice of the motion should be given to the plaintiff in the execution.

⁹⁰⁴ *Tucker v. Black*, 1 How. Pr. 249.

⁹⁰⁵ *Ward v. Sands*, 4 Month. Law Bul. 51.

⁹⁰⁶ *Davies v. Skidmore*, 5 Hill, 501.

⁹⁰⁷ *Oakley v. Becker*, 2 Cow. 454.

⁹⁰⁸ *Abels v. Westervelt*, 15 Abb. Pr. 230. See, also, *Smith v. McGowan*, 3 Barb. 404, 409.

⁹⁰⁹ See *Howland v. Ralph*, 3 Johns. 20; *Duryee v. Botsford*, 24 Hun, 317, 319.

⁹¹⁰ *Frink v. Morrison*, 13 Abb. Pr. 80.

⁹¹¹ *Lambert v. Converse*, 22 How. Pr. 265, 268.

⁹¹² *Aultman & Taylor Co. v. Syme*, 56 App. Div. 165, 67 N. Y. Supp. 530; *Bowman v. Tallman*, 19 Abb. Pr. 84, 28 How. Pr. 482, 25 Super. Ct. (2 Rob.) 632, 26 Super. Ct. (3 Rob.) 633.

⁹¹³ See *Pinckney v. Hegeman*, 53 N. Y. 31.

§ 2290. Injunction.

The general rule that an injunction will not be granted where there is an adequate remedy at law applies to an injunction against proceedings on an execution.⁹¹⁴ It would seem that ordinarily an injunction should not issue where the remedy by moving to quash the writ is adequate. An injunction may be issued to restrain the collection from exempt property,⁹¹⁵ and financial irresponsibility for damages on the part of the judgment creditor is ground where there has been an excessive levy.⁹¹⁶ So where an assignee for creditors claims the property about to be levied on as the property of the assignor, an injunction may be granted because of the uncertainty and inadequacy of actions against the sheriff, notwithstanding the creditors in the several executions have given indemnity.⁹¹⁷ But a levy will not be enjoined in behalf of the assignee for benefit of creditors of the judgment debtor who claims the property as said assignee, merely upon allegations that the assignee's remedy at law by action against the sheriff for the value of the property must be tardy and that its prosecution would impede the execution of his trust.⁹¹⁸ The necessity of a resort to extrinsic evidence, in any event, to show the validity of plaintiff's title to real estate as against a purchaser at an execution sale, gives plaintiff a good cause of action to restrain the sale.⁹¹⁹ A third person whose goods are levied on as the property of the judgment debtor may sue to enjoin further proceedings, where the debtor is financially irresponsible.⁹²⁰ An injunction may be granted to prevent the sheriff

⁹¹⁴ *Lansing v. Eddy*, 1 Johns. Ch. 49; *Drewson v. American Surety Co.*, 22 Wkly. Dig. 562.

⁹¹⁵ *Buffum v. Forster*, 77 Hun, 27, 59 State Rep. 833, 28 N. Y. Supp. 285.

⁹¹⁶ *Funk v. Brooklyn Glass & Mfg. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086.

⁹¹⁷ *Newcombe v. Irving Nat. Bank*, 51 Hun, 220, 21 State Rep. 323, 4 N. Y. Supp. 37.

⁹¹⁸ *Chittenden v. Davidson*, 52 Super. Ct. (20 J. & S.) 421.

⁹¹⁹ *Riley v. Schoeffel*, 19 Wkly. Dig. 438.

⁹²⁰ *Sickles v. Combs*, 10 Misc. 551, 65 State Rep. 260, 32 N. Y. Supp. 181.

from paying over the proceeds where the sale is illegal.⁹²¹ Laehes in suing may preclude relief.⁹²² The judgment debtor is a necessary party where a mortgagee sues and the question is whether the execution was issued for too much and whether an assignment of the judgment was valid.⁹²³ Enjoining an execution because the judgment ought not to be enforced has nothing to do with the law of executions and will not be considered.

§ 2291. Stay of proceedings.

A perpetual stay of an execution will be ordered to prevent fraud or great injustice, where complete justice may be done to all persons concerned,⁹²⁴ as where the lien of the judgment has expired.⁹²⁵ The stay may be granted to enable the judgment debtor to bring a cross action and offset judgments.⁹²⁶ But an execution in ejectment against a city will not be stayed to give the city time for the exercise of the right of eminent domain.⁹²⁷ Opening a default does not, per se, stay proceedings on the execution.⁹²⁸ Where the facts are disputed, the relief will not be granted on motion.⁹²⁹ The application for a stay on the ground of payments made, but not allowed, must set forth the details of such payment.⁹³⁰

— **Discharge in bankruptcy.** Where defendant has had no opportunity to plead his discharge as a bankrupt or insolvent, in the action, he may move for a perpetual stay of the execution.⁹³¹ The court may open the cause so as to give him

⁹²¹ *Burkhardt v. Sanford*, 7 How. Pr. 329.

⁹²² *Thursby v. Mills*, 11 How. Pr. 116.

⁹²³ *Warner v. Paine*, 3 Barb. Ch. 630.

⁹²⁴ *Lansing v. Orcott*, 16 Johns. 4.

⁹²⁵ *Wilson v. Smith*, 2 Code R. 18.

⁹²⁶ *Knox v. Hexter*, 42 Super. Ct. (10 J. & S.) 496.

⁹²⁷ *Strong v. City of Brooklyn*, 12 Hun, 453.

⁹²⁸ *Carswell v. Neville*, 12 How. Pr. 445.

⁹²⁹ *Myers v. Kelsey*, 19 Johns. 197; *Hewson v. Deygert*, 8 Johns. 257.

See, also, *Davis v. Tiffany*, 1 Hill, 642.

⁹³⁰ *Owen v. Jacobia*, Sheld. 455.

⁹³¹ *Monroe v. Upton*, 50 N. Y. 593. Motion as proper remedy, see *Dresser v. Shufeldt*, 7 How. Pr. 85; *Bangs v. Avery*, 2 How. Pr. 49;

a chance to try the question, where fraud or other ground impeaching the validity of the discharge is alleged.⁹³²

ART. XI. LIABILITY FOR WRONGFUL LEVY OR SALE.

§ 2292. Two classes of wrongful levy.

A levy may be wrongful either because (1) the writ does not justify any levy whatever or because (2) the writ does not justify the levy actually made.⁹³³

§ 2293. Where writ does not justify any levy whatever.

The liability of an officer for levying under a writ void or irregular when issued, or under a writ valid when issued and subsequently losing its force by satisfaction or otherwise, is limited to those cases in which he has notice, either on the face of the writ, or by some other means, of the infirmity which renders the writ invalid.⁹³⁴ The sheriff is protected by an execution apparently regular on its face notwithstanding that it is, in fact, void.⁹³⁵

— **Liability of execution creditor.** The execution creditor is liable as a trespasser where the sheriff proceeds under a void execution, as where the execution is based on a judgment which has been satisfied or extinguished,⁹³⁶ or where based on a judgment rendered after service of a summons not naming the person whose property is taken.^{936a} So a sale after a tender of damages, costs, and sheriff's fees, makes the creditor liable, especially where such tender is made in his presence.⁹³⁷ It is no defense that the wrongdoer afterward sub-

Bangs v. Strong, 1 How. Pr. 181; Cramer v. ———, 5 Super. Ct. (3 Sandf.) 700. Recitals of discharge as conclusive, see Wall v. Thorn, 14 Abb. Pr. 292.

⁹³² Baker v. Taylor, 1 Cow. 165.

⁹³³, ⁹³⁴ Freeman, Executions, § 272.

⁹³⁵ Clearwater v. Brill, 63 N. Y. 627.

⁹³⁶ Swan v. Saddlemire, 8 Wend. 676; Ruckman v. Cowell, 1 N. Y. (1 Comst.) 505; McGuinty v. Herrick, 5 Wend. 240. Express malice is not essential. Brown v. Fleeter, 7 Wend. 301.

^{936a} Durst v. Ernst, 91 N. Y. Supp. 13.

⁹³⁷ Tiffany v. St. John, 65 N. Y. 314.

jects the same property to a valid process.⁹³⁸ If the execution is not void, but merely voidable, the creditor cannot be held liable for acts done before the execution was set aside.⁹³⁹ Proceedings had under an execution based on an erroneous judgment do not become irregular or unlawful by a subsequent reversal of the judgment.⁹⁴⁰ It need not appear that the creditor specially directed the issuing of the writ.⁹⁴¹ Merely failing to countermand an execution after the return day will not support an action.⁹⁴² Where, at the time of a levy, the sheriff has writs in favor of different parties, either may be sued separately.⁹⁴³ Persons concerned in the issuance of a void execution are jointly and severally liable for the damage resulting.⁹⁴⁴

§ 2294. Where writ does not justify levy actually made.

In the absence of directions, the officer making the levy or sale acts at his peril in levying on property not belonging to the defendant in the execution, or in making an excessive levy, or in levying on property exempt from sale. Issuing an execution without any direction as to how it is to be enforced or as to what property is to be taken, implies only an authority to do a lawful act pursuant to its command.⁹⁴⁵ If the officer is in doubt he should require indemnity before proceeding. However, he is not liable for levying on exempt

⁹³⁸ *Lyon v. Yates*, 52 Barb. 237.

⁹³⁹ *Piepglas v. Edmunds*, 5 Misc. 314, 25 N. Y. Supp. 961, 23 Civ. Proc. R. (Browne) 241, 31 Abb. N. C. 39. An execution creditor is not a trespasser because the execution is issued for too much. *Peck v. Tiffany*, 2 N. Y. (2 Comst.) 451.

⁹⁴⁰ *Kissock v. Grant*, 34 Barb. 144; *Reinmiller v. Skidmore*, 7 Lans. 161.

⁹⁴¹ *Newberry v. Lee*, 3 Hill, 523. Compare *Copley v. Rose*, 2 N. Y. (2 Comst.) 115. But it must appear that he was responsible for it. *Percival v. Jones*, 2 Johns. Cas. 49; *Taylor v. Trask*, 7 Cow. 249; *Gold v. Bissell*, 1 Wend. 210.

⁹⁴² *Vail v. Lewis*, 4 Johns. 450.

⁹⁴³ *Wehle v. Butler*, 61 N. Y. 245.

⁹⁴⁴ *Kreiser v. Scofield*, 9 Misc. 200, 60 State Rep. 839, 29 N. Y. Supp.

685.

⁹⁴⁵ *Bowe v. Wilkins*, 105 N. Y. 322; *Welsh v. Cochran*, 63 N. Y. 181.

property unless he continues to assert his rights after a claim of exemption is made,⁹⁴⁶ or unless he knows that the property is exempt when he makes the levy.⁹⁴⁷ An offer to relinquish the levy, where made some time after the levy, will not affect the right of action.⁹⁴⁸ Such a restoration, even when accepted, does not bar the right of action but merely constitutes matter in mitigation of damages.⁹⁴⁹

— **Liability of execution creditor.** If the execution creditor directs the levy,⁹⁵⁰ or approves of the levy,⁹⁵¹ or indemnifies the sheriff against the levy,⁹⁵² he is liable; but it is not enough that his attorney ordered the levy,⁹⁵³ and there is no presumption that the creditor directed the levy.⁹⁵⁴ So an execution creditor present at the levy, who refers the officer to his attorney for instructions, is liable for a wrongful levy.⁹⁵⁵ So he is liable if he receives the proceeds, with knowledge of the facts, and fails to repudiate the officer's acts.⁹⁵⁶ He is jointly and severally liable with the sheriff⁹⁵⁷ and his sureties

⁹⁴⁶ *Wilcox v. Howe*, 59 Hun, 268, 12 N. Y. Supp. 783; *Gilewicz v. Goldberg*, 69 App. Div. 438, 74 N. Y. Supp. 984.

⁹⁴⁷ *Frost v. Mott*, 34 N. Y. 253; followed in *Grieb v. Northrup*, 66 App. Div. 86, 72 N. Y. Supp. 481.

⁹⁴⁸ *Livermore v. Northrup*, 44 N. Y. 107. Return of property sold, after sale, does not bar an action or mitigate the damages. *Kelly v. Mesier*, 21 App. Div. 253, 47 N. Y. Supp. 675.

⁹⁴⁹ *Hanmer v. Wilsey*, 17 Wend. 91; *Higgins v. Whitney*, 24 Wend. 379.

⁹⁵⁰ *Fonda v. Van Horne*, 15 Wend. 631; *Stewart v. Wells*, 6 Barb. 79.

⁹⁵¹ *Alvord v. Haynes*, 13 Hun, 26.

⁹⁵² *Ball v. Loomis*, 29 N. Y. 412.

⁹⁵³ *Fischer v. Hetherington*, 11 Misc. 575, 66 State Rep. 178, 32 N. Y. Supp. 795; *Averill v. Williams*, 4 Denio, 295.

⁹⁵⁴ *Averill v. Williams*, 1 Denio, 501.

⁹⁵⁵ *Judson v. Cook*, 11 Barb. 642; *Armstrong v. Dubois*, 1 Abb. Dec. 8, 4 Keyes, 291.

⁹⁵⁶ *Brainerd v. Dunning*, 30 N. Y. 211; *Murray v. Bining*, 3 Abb. Dec. 336, 3 Keyes, 107, 33 How. Pr. 425; *Castle v. Lewis*, 78 N. Y. 131. But knowledge of attorney is not knowledge of his client, the execution creditor. *Bowe v. Wilkins*, 105 N. Y. 322.

⁹⁵⁷ *Ball v. Loomis*, 29 N. Y. 412.

on the indemnity bond,⁹⁵⁸ where he indemnifies the sheriff for making a levy.

— **Liability of third person.** A third person who aids the officer in overcoming resistance to a levy on goods not belonging to the debtors is liable for an assault and battery.⁹⁵⁹ And an intermeddler who points out property to be levied on is liable.⁹⁶⁰

⁹⁵⁸ Dyett v. Hyman, 129 N. Y. 351.

⁹⁵⁹ See Elder v. Morrison, 10 Wend. 127.

⁹⁶⁰ Merrill v. Near, 5 Wend. 237.

CHAPTER II.

EXECUTION AGAINST THE PERSON.

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§ 2295. General considerations.

In the preceding chapter relating to executions against property some of the Code provisions which apply equally well to executions against property and to executions against the person have been considered, so that it will not be necessary, in this chapter, to more than refer thereto. The provisions applicable only to an execution against the person are embraced in sections 1487 to 1495 of the Code. An execution against the person is often called a body execution. It partakes of the nature of punishment for crime and hence the

Code provisions must be closely followed to entitle a party thereto.

§ 2296. In what actions allowable.

Where a judgment can be enforced by execution, as prescribed in section 1240 of the Code,¹ an execution against the person of the judgment debtor may be issued thereupon, in either of the following cases:

1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action, except where the person to be arrested is a woman and she has not been arrested before judgment.

2. In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, where it has not been vacated.² In other words a body execution is proper where the judgment is one enforceable by execution rather than by contempt proceedings, in two cases, viz.: the one where an order of arrest before judgment would be proper because the action is one enumerated in section 549 of the Code; the other, where an order of arrest has been granted, executed, and not vacated.

— **As dependent on nature of action.** Inasmuch as a body execution may be issued "where the plaintiff's right to arrest the defendant depends on the nature of the action," it becomes necessary to determine in what actions an order of arrest before judgment can be granted because of the nature of the action. Section 549 of the Code enumerated such actions. Said section has been treated of in the chapter on arrest,³ so that only a brief reference thereto will be made in this connection. Concisely stated, an arrest is proper, under such section, in actions to recover a fine or penalty;⁴ actions to recover damages for a personal injury;⁵ actions for injury to

¹ See ante, § 2200.

² Code Civ. Proc. § 1487.

³ Volume 2, pp. 1278-1296, 1298, 1300.

⁴ Volume 2, p. 1279.

⁵ Volume 2, p. 1279. Action to recover damages for negligent acts of omission in action for personal injuries. *Gallagher v. Dolan*, 27 Misc.

property;⁶ action for breach of promise to marry;⁷ actions for misconduct or neglect, in office, or in a professional em-

122, 57 N. Y. Supp. 334, and cases cited. Defendant need not be personally negligent. *Ossman v. Crowley*, 101 App. Div. 597, 92 N. Y. Supp. 29. Contra, *Dauids v. Brooklyn H. R. Co.*, 45 Misc. 208, 92 N. Y. Supp. 220; *Lasche v. Dearing*, 23 Misc. 722, 53 N. Y. Supp. 58. Action for damages for causing death by negligence is an action for personal injuries. *Haines v. Jeroloman*, 2 Civ. Proc. R. (McCarty) 196. But see note following.

⁶ Volume 2, p. 1280. Action to recover damages for death by wrongful act is action for injury to property. *People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135. An action against a common carrier for non-delivery of goods, in the form of an action on contract, is not an action for the "injury to property." *Catlin v. Adirondack Co.*, 81 N. Y. 639. An action to recover damages from the defendant for negligent injury to property of the plaintiff in his possession is to be regarded as an action for misfeasance or malfeasance, and not an action for breach of contract though the property was in possession of defendant by virtue of a bailment. *Keeler v. Clark*, 18 Abb. Pr. 154. Where the gravamen of an action is willful injury to plaintiff's property, although the complaint demands an adjudication upon the construction of the will under which plaintiff claims, an execution may be issued against defendant's person. *Niver v. Niver*, 43 Barb. 411, 19 Abb. Pr. 14, 29 How. Pr. 6. A complaint alleging a sale and delivery of an organ at an agreed price, plaintiff's payment of a sum thereon, and that defendant took away the organ, and has since kept it, and refuses to return it or to make a payment, states a cause of action in tort, and execution may be issued against the body of plaintiff for nonpayment of a judgment for costs recovered against him in the action. *Beger v. Pagett*, 14 Wkly. Dig. 386. An action on a judgment for conversion, being itself on contract, does not admit of execution against the person being issued, though the original judgment contained a provision therefor. *Gottlieb v. Glazier*, 25 Misc. 765, 54 N. Y. Supp. 1020. Where no order of arrest issued in an action brought in a justice's court to recover chattels, with damages for their detention, execution against the person cannot issue on a recovery of damages for their detention. *Matter of Short*, 35 App. Div. 623, 54 N. Y. Supp. 1075. Use of words "embezzled" and "converted" does not, per se, make the complaint one based on tort. *Day v. Duckworth*, 17 Misc. 305, 40 N. Y. Supp. 378. The liability of the consignee of goods who receives them from time to time under an agreement that he is to sell them for consignors' account to customers of his own, to collect the proceeds and account to his consignors, receiving as compensation a percentage of the profits which accrue, is on contract, and though the relation is a fiduciary one, and his failure to account is a violation of duty, it does not of itself amount to a conversion,

ployment;⁸ actions to recover damages for fraud or deceit;⁹ actions to recover a chattel, where intent to defraud is charged;¹⁰ actions for conversion, embezzlement, etc., in fiduciary capacity;¹¹ actions on contracts where there is alleged the existence of fraud in making the contract or in an attempt to make the defendant execution proof;¹² and actions to recover public property.¹³

An execution against the person cannot be issued in suits

and on a judgment against him in an action in which no order of arrest has been obtained, an execution against the person is not authorized. *Wright v. Duffie*, 23 Misc. 338, 51 N. Y. Supp. 255.

⁷⁻⁹ Volume 2, p. 1282.

¹⁰ Volume 2, p. 1282; *Lehman v. Mayer*, 68 App. Div. 12, 74 N. Y. Supp. 194.

¹¹ Volume 2, p. 1284; *Knapp v. Murphy*, 20 App. Div. 83, 46 N. Y. Supp. 1047. Since the amendment of 1886 (c. 672), to Code Civ. Proc. § 549, including as one of the grounds of arrest where the right depends on the nature of the action, the case of an action for money converted by one in a fiduciary relation, an execution against the person of a judgment debtor may be issued upon a judgment in such a case without an arrest before judgment. This follows from Code Civ. Proc. § 1487, providing that an execution may be issued against the person of the judgment debtor, where the plaintiff's right to arrest the defendant depends upon the nature of the action. *Roeber v. Dawson*, 22 Abb. N. C. 73, 21 State Rep. 160, 3 N. Y. Supp. 122, 15 Civ. Proc. R. (Browne) 417. The allegation that plaintiff received the money for which suit is brought, in a fiduciary capacity, is material in the complaint, in order to issue an execution against the person. *Bussey & McLeod Stove Co. v. Wilkins*, 1 App. Div. 154, 72 State Rep. 421, 36 N. Y. Supp. 977; *Steamship Richmond Hill Co. v. Seager*, 31 App. Div. 288, 6 Ann. Cas. 65, 52 N. Y. Supp. 985. In a complaint for money received, an unnecessary allegation that it was so received in a fiduciary capacity, does not authorize a direction in the judgment that it be enforced by execution against the person. *Prouty v. Swift*, 51 N. Y. 594. Money received by commission merchants as received in fiduciary capacity. *Wood v. Henry*, 40 N. Y. 124. Money received by attorney. *Sherman v. Grinnell*, 159 N. Y. 50. Money received by banker. *Turney v. Guthrie*, 15 N. Y. Supp. 679.

¹² Volume 2, p. 1288. Fraud in contracting only a part of the debt is not ground for allowing execution against the person, on a judgment recovered for the whole debt. *How v. Frear*, 13 Abb. Pr. 241, note, 21 How. Pr. 343.

¹³ Volume 2, p. 1294.

in equity except where a common-law action is brought on the equity side of the court for special reasons giving equity jurisdiction;¹⁴ but the joinder of a demand for equitable relief does not preclude the right to a body execution.¹⁵

As stated in a preceding volume in the chapter on arrest,¹⁶ an execution against the person is not proper where an arrest is authorized on only a part of the causes of action set forth in the complaint,¹⁷ notwithstanding plaintiff elects to proceed, and recovers judgment, solely on the cause of action on which an arrest was proper.¹⁸ But such a joinder does not affect the right of defendant to arrest plaintiff where the former recovers a judgment for costs.¹⁹

Where the right to issue an execution depends on the nature of the action, it is not necessary that an order of arrest be previously granted. But an execution against the person, without a previous order of arrest, can be issued only where the complaint necessarily states a cause of action covered by section 549 of the Code.²⁰ The facts to authorize the body execution must be pertinent to the cause of action, and such as must be proved on the trial.²¹ An execution against the person cannot be sustained by the findings of the judge on the trial, if the complaint shows a cause of action for which the law does now allow arrest.²² So the right to an execution against the person cannot be made to appear by recitals in the *postea* of the judgment roll as made up by the clerk.^{22a}

— **As dependent on issuance of order of arrest.** The second case in which a body execution is authorized is “where an order of arrest has been granted and executed²³ in the

¹⁴ *Broome v. Cochran*, 31 Misc. 660, 64 N. Y. Supp. 1043.

¹⁵ *People v. Fargo*, 4 App. Div. 544, 38 N. Y. Supp. 1004.

¹⁶ Volume 2, p. 1294.

¹⁷ *Sherwood v. Pierce*, 50 Super. Ct. (18 J. & S.) 378.

¹⁸ *Woods v. Armstrong*, 29 Misc. 660, 62 N. Y. Supp. 759.

¹⁹ *Miller v. Scherder*, 2 N. Y. (2 Comst.) 262.

²⁰ *Aetna Ins. Co. v. Shuler*, 28 Hun, 338.

²¹ *Elwood v. Gardner*, 45 N. Y. 349, 353.

²² *Pam v. Vilmar*, 52 How. Pr. 238.

^{22a} Recitals in *postea* were stricken out on motion. *Bacon v. Grossmann*, 90 App. Div. 204, 86 N. Y. Supp. 66.

²³ The order is executed when the arrest is made and defendant kept

action, and, if it was executed against the judgment debtor, where it has not been vacated." It is submitted, though there is no authority so holding, that this provision should be stricken from the Code inasmuch as it can have no application. The reason is that if the action is one enumerated in section 549 of the Code a body execution may be issued, as already stated, irrespective of whether an order of arrest has been granted; on the other hand, the only other section authorizing an order of arrest is section 550 which is the substitute for a ne exeat and which provides therefor only where the complaint demands a judgment requiring "the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt." It has already been stated that a body execution is proper only where the judgment can be enforced by execution, and hence it would seem that a person, though arrested before judgment pursuant to section 550 of the Code, cannot be held on a body execution. Prior to the amendments of 1886 which transferred subdivisions one, two, and three of section 550 to section 549, this clause was of practical application but now it seems to be obsolete.

The fact that an order of arrest, granted in an action, was vacated on defendant's motion, will not prevent the issuance of a body execution, where, subsequently thereto, the complaint was amended so as to state a different cause of action, which entitled the plaintiff to such execution upon final recovery.²⁴ Consent to defendant's release from an order of arrest issued as a provisional remedy does not bar the right to issue a body execution.²⁵ It has been held that it is only where the cause of arrest forms no proper part of the cause of action and cannot properly be stated in the complaint that a preliminary order of arrest is required.²⁶ So it has been

in custody. Code Civ. Proc. § 563. Necessity of service of order. *People v. Carpenter*, 46 Barb. 619.

²⁴ *Carrigan v. Washburn*, 18 Civ. Proc. R. (Browne) 77, 7 N. Y. Supp. 262.

²⁵ *Meech v. Loomis*, 14 Abb. Pr. 428.

²⁶ *Church of the Redeemer v. Crawford*, 36 Super. Ct. (4 J. & S.) 307.

Persons Entitled.

held that if there are two or more causes of action and the judgment is not based on the cause of action on which the order of arrest was granted but on one on which defendant would not be liable to arrest, a body execution cannot be issued.²⁷

An execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, has not been vacated.²⁸

§ 2297. Persons entitled.

In an action enumerated in section 549 of the Code in which defendant is liable to arrest if plaintiff succeeds, a judgment in favor of defendant for costs may be enforced by a body execution;²⁹ and this is so though plaintiff unites causes of action, as to a part of which a body execution is improper.³⁰ It is immaterial that plaintiff was defeated on a technicality,³¹ or that defendant, who has agreed that his attorney should have the costs, consents to relieve plaintiff from all costs.³² Section 15 of the Code expressly excepts costs awarded by a final judgment from the prohibition against arrest and imprisonment for the nonpayment of costs. But execution will not issue merely to collect interlocutory costs.³³ Of course if defendant recovers on a counterclaim he may have a body execution if otherwise proper.³⁴

²⁷ *Smith v. Knapp*, 30 N. Y. 581.

²⁸ Code Civ. Proc. § 1488; *Hovey v. Starr*, 42 Barb. 435; *Maloy v. Dagnal*, 1 T. & C., Addenda, 10. When female may be arrested, see volume 2, p. 1305.

²⁹ *Laffier v. Haft*, 86 App. Div. 284, 83 N. Y. Supp. 763; *Kloppenbergh v. Neefus*, 6 Super. Ct. (4 Sandf.) 655; *Parker v. Speer*, 16 Wkly. Dig. 417.

³⁰ *Miller v. Scherder*, 2 N. Y. (2 Comst.) 262.

^{31, 32} *Parker v. Spear*, 62 How. Pr. 394, 49 Super. Ct. (17 J. & S.) 1.

³³ *McCulloch v. Hoffman*, 1 Month. Law Bul. 27.

³⁴ See Code Civ. Proc. §§ 720, 974.

§ 2298. Execution against guardian ad litem.

A judgment for costs in favor of a defendant in an action by an infant for personal injuries may be enforced by execution against the person of the guardian ad litem.³⁵

§ 2299. Issuance.

The rules laid down in sections 1375 to 1379 of the Code as to the time when executions in general may be issued³⁶ apply to body executions. The execution may be issued, as of course, more than five years after the recovery of judgment where an execution against property has been issued within the five years.³⁷ No motion need be made for leave to issue, if an execution against property has issued within five years after the entry of judgment.³⁸ The judgment need not award the execution.³⁹ The execution may be issued to any county.⁴⁰ A judgment recovered in another county is not required to be docketed in the county where an execution against the person is issued, as such an execution may issue in any county, in a proper case, immediately upon the return unsatisfied of an execution against the property of the debtor in the county where he resides.⁴¹ When part of a judgment in tort is assigned, execution against the person may still issue in the name of the assignor, for the full amount of the judgment.⁴²

³⁵ *Miller v. Woodhead*, 52 Hun, 127, 5 N. Y. Supp. 88.

³⁶ See ante, §§ 2208 et seq.

³⁷ *Quigley v. Baumann*, 29 Misc. 515, 61 N. Y. Supp. 966.

³⁸ *Miller v. Woodhead*, 52 Hun, 127, 5 N. Y. Supp. 88; *Kloppenbergh v. Neefus*, 6 Super. Ct. (4 Sandf.) 655. So held, in effect, where order of arrest had been granted. *Bull v. Melliss*, 13 Abb. Pr. 241; *Humphrey v. Brown*, 17 How. Pr. 481.

³⁹ So held where order of arrest had been granted. *How v. Frear*, 13 Abb. Pr. 241, note; *Lovee v. Carpenter*, 3 Abb. Pr. (N. S.) 309; *Corwin v. Freeland*, 6 N. Y. (2 Seld.) 560. Where order of arrest had been granted, record need not show right to execution. *Corwin v. Freeland*, 6 N. Y. (2 Seld.) 560.

⁴⁰ Code Civ. Proc. § 1365.

⁴¹ *Segelke v. Finan*, 22 Abb. N. C. 458, 5 N. Y. Supp. 671.

⁴² *Dougherty v. Gardner*, 8 Abb. N. C. 224.

Issuance.

Payment of the judgment, to deprive the creditor of the right to issue a body execution, must be actual and in cash.⁴³

— **Execution against property as condition precedent.**

Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail, by virtue of an execution against his person, issued in another action, or of an order of arrest on a surrender by his bail, in the same action, an execution against his person cannot be issued, until an execution against his property has been returned, wholly or partly unsatisfied. If he is a resident of the state, the execution against his property must have been issued to the county where he resides.⁴⁴ Prior to the present Code it was held that it was sufficient that the execution against property be issued to any county but now it is expressly provided that such execution must be issued to the county where the debtor resides. An execution against property is not issued to the county of the debtor's residence, so as to be a foundation for a body execution, where issued to the county in which the debtor is incarcerated for crime.⁴⁵ But where the execution against property has been issued and returned unsatisfied in the county of the debtor's residence, it is not necessary that it should be so issued and returned in the county where the judgment was recovered, before issuing a body execution.⁴⁶ The judgment debtor may insist that the execution is void, where he is not already actually confined, unless an execution against property is first issued;⁴⁷ but inasmuch as this requirement is for the debtor's benefit it may be waived by him.⁴⁸ And though it is irregular to issue an execution against the person before return of execution against property, yet when the latter has been filed, and it was by the sheriff's neglect that the return has not

⁴³ *Codwise v. Field*, 9 Johns. 263; *Carrigan v. Washburn*, 18 Civ. Proc. R. (Browne) 77, 7 N. Y. Supp. 262.

⁴⁴ Code Civ. Proc. § 1489. County where debtor resides, see *People v. Van Hoesen*, 62 How. Pr. 76. Where there are several defendants, see *Bank of U. S. v. Jenkins*, 18 Johns. 305.

⁴⁵ *American Surety Co. v. Cosgrove*, 40 Misc. 262, 81 N. Y. Supp. 945.

⁴⁶ *O'Shea v. Kohn*, 38 Hun, 149.

⁴⁷ *Bergman v. Noble*, 45 Hun, 133.

⁴⁸ *New York Guaranty & Indemnity Co. v. Rogers*, 71 N. Y. 377.

been indorsed, the defect is amendable, and the second execution may be upheld by allowing the return to be indorsed *nunc pro tunc*.⁴⁹ Sixty days need not intervene between the issuance of an execution against property, and against the person.⁵⁰

— **Simultaneous executions against property and person.**

An execution against the person of the judgment debtor cannot be issued, without leave of the court, while an execution against his property, issued in the same action, remains unreturned; and an execution against his property cannot be issued, without leave of the court, while an execution against his person, issued in the same action, remains unreturned.⁵¹

§ 2300. **Contents.**

In addition to the description of the judgment, etc., which is an essential requisite of all executions,⁵² the Code provides as follows: "An execution against the person must substantially require the sheriff to arrest the judgment debtor and commit him to the jail of the county, until he pays the judgment or is discharged according to law. Except where it may be issued without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued."⁵³ The execution need not recite the facts authorizing the execution,⁵⁴ but it must specify the county to which execution against the property was issued,⁵⁵ though failure to

⁴⁹ *Hall v. Ayer*, 9 Abb. Pr. 220, 19 How. Pr. 91.

⁵⁰ *Fake v. Edgerton*, 12 Super. Ct. (5 Duer) 681.

⁵¹ Code Civ. Proc. § 1490.

⁵² Code Civ. Proc. §§ 1366, 1367. See ante, §§ 2220, 2221.

⁵³ Code Civ. Proc. § 1372.

⁵⁴ *Matter of Remsen*, 2 Month. Law Bul. 55.

⁵⁵ *People v. Reilly*, 58 How. Pr. 218. But an execution which recites the issue and return unsatisfied of an execution against property in the county in which the judgment debtor resides need not recite also the issuing of an execution against property in the county where the judgment was recovered, nor a statement of the fact that the judgment had been docketed in the county of the debtor's residence. *O'Shea v. Kohn*, 38 Hun, 149.

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name such county is amendable,⁵⁶ as is a mistake in naming the county.⁵⁷ The want of a teste is not fatal.⁵⁸ The Code provisions already set forth as to whom the execution must be directed, and the indorsement by the sheriff of the time when received, apply to body executions. It has been held that if the judgment is against two, execution against the person of one alone cannot be issued,⁵⁹ except where he is the only defendant liable to be taken on a body execution because an order of arrest was granted against him alone.⁶⁰ If the execution is based on a judgment against joint debtors, and only a part were served with summons, it should be indorsed with a direction to the sheriff not to enforce the execution against the named defendants who were not summoned.⁶¹

— Form of execution.

The People of the State of New York,

To the Sheriff of the County of ———, Greeting:

Whereas judgment was rendered on the ——— day of ———, 190—, in an action in the ——— court, between ———, plaintiff, and ———, defendant, in favor of the said ———, against the said ———, for the sum of ———, as appears to us by the judgment roll, filed in the office of the clerk of the county of ———; and whereas the said judgment was docketed in the office of the clerk of your county on the ——— day of ———, 190—; and whereas an execution against the property of the judgment debtor has been duly issued to the sheriff of the county of ———, where the said judgment debtor resides, and has been returned unsatisfied, and the sum of ——— dollars is now actually due thereon:

Therefore we command you, that you arrest the said judgment debtor and commit him to the jail of your county until he pay the said judgment, or is discharged according to law,⁶² and that you return this

⁵⁶ Walker v. Isaacs, 36 Hun, 233; Eads v. Wynne, 79 Hun, 463, 29 N. Y. Supp. 983.

⁵⁷ Steamship Richmond Hill Co. v. Seager, 31 App. Div. 288, 294, 52 N. Y. Supp. 985.

⁵⁸ People v. Van Hoesen, 62 How. Pr. 76.

⁵⁹ Farmers' & Mechanics' Nat. Bank v. Crane, 15 Abb. Pr. (N. S.) 434.

⁶⁰ Whitman v. James, 14 Wkly. Dig. 214, 10 Daly, 490.

⁶¹ Code Civ. Proc. §§ 1934, 1935.

⁶² Omission of words "or be discharged according to law" is not fatal. Hutchinson v. Brand, 9 N. Y. (5 Seld.) 208.

Effect.

execution within sixty days after its receipt by you to the clerk of
 ———.⁶³

Witness, ———, at ———, the ——— day of ———, 190—.

[Signature of attorney.]

§ 2301. Making the arrest.

The rules as to the mode of making the arrest are the same as those already laid down where the arrest is before judgment.⁶⁴ A sheriff cannot arrest a debtor under a body execution except in the county where the sheriff resides.⁶⁵ After the arrest is made, the debtor cannot require the officer to make a levy or accept anything other than money to satisfy the execution.⁶⁶

§ 2302. Effect.

Imprisonment under a body execution suspends the lien of the judgment, and the right to enforce it, during the continuance of the judgment,⁶⁷ so as to bar the creditor from any other remedy for the collection of the debt during such time. During that time no action can be maintained by the judgment creditor against one standing as surety for the debtor, or to enforce collateral securities for the payment of the judgment.

⁶³ Omission of a clause requiring the sheriff to return it to the proper clerk within sixty days from its receipt is amendable. *Benedict & Burnham Mfg. Co. v. Thayer*, 20 Hun, 547; *Id.*, 21 Hun, 614. Leave to amend execution against the person by inserting proper direction as to return should be granted as a matter of course, if the defect is not matter of substance. *Id.*

⁶⁴ Volume 2, pp. 1336-1338.

⁶⁵ *Fisher v. Louny*, 41 Misc. 552, 85 N. Y. Supp. 115.

⁶⁶ *Blakely v. Weaver*, 46 Hun, 174.

⁶⁷ *Hoyle v. McCrea*, 42 App. Div. 313, 59 N. Y. Supp. 200; *Ryle v. Falk*, 24 Hun, 255. Taking defendant's body in execution, suspends the lien of the judgment, and a sale of his land upon a junior judgment confers title free from that lien. *Jackson v. Benedict*, 13 Johns. 533; *Chapman v. Hatt*, 11 Wend. 41. The principle that title passes upon recovery of a judgment for conversion and satisfaction of the judgment is not applicable where there has been no actual payment or satisfaction, but only imprisonment under the judgment. *Goff v. Craven*, 34 Hun, 150.

Effect.

ment.⁶⁸ The imprisonment is a satisfaction, for the time being, notwithstanding the debtor is admitted to the jail limits, though it is otherwise after the debtor escapes.⁶⁹ After a discharge by the expiration of three or six months,⁷⁰ or on executing an assignment,⁷¹ other remedies may be resorted to, but a second body execution cannot be issued. At common law the voluntary release of a judgment debtor arrested under a body execution operated as an absolute satisfaction of the judgment notwithstanding any agreement to the contrary by the parties, so as to preclude a second execution;⁷² but permitting the imprisoned debtor to visit his sick wife on condition that he shall return the same day does not operate as a satisfaction of the judgment.⁷³ It is submitted that the voluntary discharge of the prisoner should preclude another body execution but should not prevent enforcement of the judgment in any other way; and this is the rule laid down by the Code where the creditor discharges the debtor after imprisonment for thirty days or more.⁷⁴

§ 2303. **Setting aside.**

The court from which the writ issues has inherent power, on motion, to set aside the execution.⁷⁵ It will not be set aside upon the ground of irregularity in the entry of the judgment upon which it is issued,⁷⁶ nor on the ground that

⁶⁸ Koenig v. Steckel, 58 N. Y. 475.

⁶⁹ McGuinty v. Herrick, 5 Wend. 240; Code Civ. Proc. § 1492; Vidrard v. Fradneburg, 53 How. Pr. 339.

⁷⁰ Code Civ. Proc. § 111; Sandman v. Seaman, 84 Hun, 337, 32 N. Y. Supp. 338.

⁷¹ Code Civ. Proc. § 2213; Prusia v. Brown, 45 Hun, 80.

⁷² Green v. Young, 48 State Rep. 571, 27 N. Y. Supp. 255, which held that such rule still prevails. Rowe v. Guillaume, 15 Hun, 462; Powers v. Wilson, 7 Cow. 274; Utica Ins. Co. v. Power, 3 Paige, 365. But stipulation between creditor and debtor that irregular execution be set aside is not such a consent as to operate as a satisfaction of the judgment. Woodruff v. McGuire, 1 City Ct. R. 281.

⁷³ Hoyle v. McCrea, 42 App. Div. 313, 59 N. Y. Supp. 200.

⁷⁴ Code Civ. Proc. § 1494.

⁷⁵ Pinckney v. Hegeman, 53 N. Y. 31, 34.

⁷⁶ Crosby v. Root, 19 Misc. 359, 43 N. Y. Supp. 512.

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the judgment is irregular in form,⁷⁷ but should be set aside if no execution against property has been issued.⁷⁸ No extrinsic facts may be considered on the motion where no order of arrest has been granted.⁷⁹ On setting aside the execution because of a technical irregularity therein, the court may impose the condition that the moving party stipulate not to sue for false imprisonment,⁸⁰ as it may where the moving party is guilty of laches and misleading acts;⁸¹ but where the execution is unlawfully issued,⁸² or where the person arrested was privileged from arrest,⁸³ no such condition can be imposed. Of course the setting aside of the execution discharges the debtor from imprisonment.⁸⁴ The execution becomes dead so that an arrest thereunder cannot be made after the reversal of the order setting aside the execution.⁸⁵

§ 2304. Custody.

The person arrested is to be kept in custody at his own expense until he satisfies the judgment rendered against him or until his discharge according to law,⁸⁶ or until the expiration of three, or six, months, according to the amount of the judgment.⁸⁷ The giving of an undertaking, to entitle the debtor to the liberties of the jail, has been considered in the chapter on arrest.⁸⁸ The support of a prisoner is a county charge where he makes oath that he is unable to support himself

⁷⁷ Compare *People v. Gorman*, 38 State Rep. 891, 14 N. Y. Supp. 547.

⁷⁸ *Noe v. Christie*, 15 Abb. Pr. (N. S.) 346.

⁷⁹ *Church of the Redeemer v. Crawford*, 36 Super. Ct. (4 J. & S.) 307, 317.

⁸⁰ *Walker v. Isaacs*, 36 Hun, 233.

⁸¹ *Sherwood v. Pierce*, 50 Super. Ct. (18 J. & S.) 378.

⁸² *Chapin v. Foster*, 101 N. Y. 1.

⁸³ *Scofield v. Kreiser*, 61 Hun, 368, 16 N. Y. Supp. 126.

⁸⁴ *Pinckney v. Hegeman*, 53 N. Y. 31, 34.

⁸⁵ *Carrigan v. Washburn*, 18 Civ. Proc. R. (Browne) 79, 9 N. Y. Supp. 541.

⁸⁶ Code Civ. Proc. § 110.

⁸⁷ See post, 2305.

⁸⁸ Volume 2, pp. 1376-1380.

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during his imprisonment.⁸⁹ The sums which may be charged against the person imprisoned and the charges which are prohibited and the necessities and luxuries which the prisoner may command, on paying therefor, are specifically regulated by the Code.⁹⁰

— **Escape.** An escape is said to be voluntary where it is by the consent of the officer.⁹¹ A negligent escape is distinguished from a voluntary one in that it implies the omission of some duty or a default on the part of the sheriff.⁹² Where an undertaking for jail liberties has been executed, the going at large, beyond the liberties of the jail, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape.⁹³ In such a case, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.⁹⁴ If a judgment is recovered against the sheriff, and due notice to defend is given the prisoner and his sureties, it is conclusive evidence of his right to recover against the prisoner and sureties on the undertaking as to any matter which was, or might have been, controverted, in an action against the sheriff.⁹⁵

Where there is an escape the execution debtor may either sue the sheriff for damages, or may issue a second body execution,⁹⁶ or may issue a second execution against property.⁹⁷

The sheriff is liable for an escape unless he can show that

⁸⁹ Code Civ. Proc. § 112.

⁹⁰ Code Civ. Proc. §§ 113-117.

⁹¹ *Tillman v. Lansing*, 4 Johns. 47; *Loosey v. Orser*, 17 Super. Ct. (4 Bosw.) 391.

⁹² *Tillman v. Lansing*, 4 Johns. 45.

⁹³ Code Civ. Proc. § 155; *Cosgrove v. Bowe*, 2 Civ. Proc. R. (Browne) 61.

⁹⁴ Code Civ. Proc. § 158, subd. 2. Amount of judgment is measure of damages. *Dunford v. Weaver*, 21 Hun, 349, 354; *Zenner v. Blessing*, 25 State Rep. 822, 4 N. Y. Supp. 866; *Hutchinson v. Brand*, 6 How. Pr. 73. Proof of debtor's insolvency cannot be received in mitigation of damages. *Zenner v. Blessing*, 25 State Rep. 822, 4 N. Y. Supp. 866.

⁹⁵ Code Civ. Proc. § 161.

⁹⁶, ⁹⁷ Code Civ. Proc. § 1492.

Discharge.

it arose from the act or fault of the plaintiff⁹⁸ or from an act of God or a public enemy.⁹⁹

It is no defense that the judgment¹⁰⁰ or execution¹⁰¹ was erroneous or irregular, unless it is also void.¹⁰² So it is no defense that no execution against property has been issued,¹⁰³ or that the debtor is insolvent.¹⁰⁴ A return of the prisoner before suit is instituted against the sheriff is a defense,¹⁰⁵ as is a discharge by a court having jurisdiction,¹⁰⁶ or the assent of plaintiff to the escape,¹⁰⁷ or the fact that the debtor is privileged from arrest,¹⁰⁸ or the fact that the execution was set aside prior to the escape,¹⁰⁹ or the fact that the judgment in the original action was not one on which an execution could legally issue.¹¹⁰

§ 2305. Discharge.

The debtor may be discharged where taken into custody after the return day,¹¹¹ or where the judgment is satisfied. But plaintiff's attorney, as such, has no power to allow a discharge of the debtor, without the actual payment of the money due on the judgment.¹¹² The same rule applies to the sheriff. A stay of proceedings on the execution does not operate as a

⁹⁸ Van Wormer v. Van Voast, 10 Wend. 356.

⁹⁹ Fairchild v. Case, 24 Wend. 383.

¹⁰⁰ Wesson v. Chamberlain, 3 N. Y. (3 Comst.) 331.

¹⁰¹ Dunford v. Weaver, 84 N. Y. 445.

¹⁰² Ginochio v. Orser, 1 Abb. Pr. 433.

¹⁰³ Feerick v. Conner, 11 Wkly. Dig. 342.

¹⁰⁴ Dunford v. Weaver, 84 N. Y. 445.

¹⁰⁵ Code Civ. Proc. § 171; Cortis v. Dailey, 21 App. Div. 1, 47 N. Y.

Supp. 454.

¹⁰⁶ Bush v. Pettibone, 4 N. Y. (4 Comst.) 300; Shaffer v. Riseley, 114 N. Y. 23; Seward v. Wales, 40 App. Div. 539, 58 N. Y. Supp. 42; Cantillon v. Graves, 8 Johns. 369. This is so though order granting discharge has not been served. Richmond v. Prait, 24 Hun, 578.

¹⁰⁷ Sweet v. Palmer, 16 Johns. 181; Powers v. Wilson, 7 Cow. 274.

¹⁰⁸ Phelps v. Barton, 13 Wend. 68.

¹⁰⁹ Pinckney v. Hegeman, 53 N. Y. 31.

¹¹⁰ Goodwin v. Griffis, 88 N. Y. 629.

¹¹¹ Schelley v. Zuils, 1 Month. Law Bul. 82.

¹¹² Eads v. Wynne, 79 Hun, 463, 29 N. Y. Supp. 983, and cases cited.

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discharge.¹¹³ A person imprisoned under an execution issued on a judgment of the New York City court may be discharged, on order, where physically unable to endure the confinement and also unable to procure sureties on a bond for the jail liberties.¹¹⁴

— **By lapse of time.** No person shall be actually imprisoned in jail for more than three months under an execution to enforce the recovery of less than \$500, and where the amount is \$500 or over, such imprisonment shall not continue for a longer period than six months.¹¹⁵ At the expiration of such time, the sheriff must discharge the prisoner without formal application being made therefor.¹¹⁶ So no person can be imprisoned within the jail liberties of any jail for a longer period than six months upon any execution or other mandate against the person, and no action shall be commenced against the sheriff on a bond given for the jail liberties for an escape made after the expiration of six months in prison.¹¹⁷ This Code provision does not apply to imprisonment under an order of arrest.¹¹⁸ A defendant imprisoned on execution is not entitled to release where he has been confined for six months under the order of arrest and execution, where the confinement under the latter process has not reached the limit.¹¹⁹ The provision applies only to debtors actually imprisoned within the jail walls or imprisoned within the jail liberties of the jail.¹²⁰ The time during which the debtor is in the custody of his counsel under a writ of habeas corpus cannot be counted.¹²¹ The six months does not run after the escape of the debtor though during all the statutory period the debtor was in a criminal jail.¹²² The discharge of a person in prison merely

¹¹³ *Sherrill v. Campbell*, 21 Wend. 287.

¹¹⁴ Code Civ. Proc. § 3163.

¹¹⁵ Code Civ. Proc. § 111, enacted in 1886.

^{116, 117} Code Civ. Proc. § 111.

¹¹⁸ *Levy v. Salomon*, 105 N. Y. 529; *In re Coyne*, 18 Civ. Proc. R. (Browne) 397, 13 N. Y. Supp. 797.

¹¹⁹ *In re Coyne*, 18 Civ. Proc. R. (Browne) 397, 13 N. Y. Supp. 797.

¹²⁰ *Wright v. Grant*, 11 Civ. Proc. R. (Browne) 407.

¹²¹ *People v. Grant*, 111 N. Y. 584.

¹²² *Eads v. Wynne*, 79 Hun, 463, 29 N. Y. Supp. 983.

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by expiration of the statutory limit does not preclude the remedy of the party against the property of the person imprisoned as it existed before such imprisonment, but does preclude a second body execution to enforce the same judgment, or an arrest in any action upon any judgment under which the execution may have been granted.¹²³

— **By direction of execution creditor.** At any time after a judgment debtor has remained in custody, by virtue of an execution against his person, for the space of thirty days, the judgment creditor may serve upon the sheriff a written notice, requiring him to discharge the judgment debtor from custody, by virtue of the execution. Whereupon the sheriff must discharge the judgment debtor, and return the execution accordingly.¹²⁴ Where an order to discharge, signed by the attorney for the judgment creditor is served on the sheriff, it carries with it the presumption that it was duly authorized.¹²⁵

— **By laches of execution creditor.** In a preceding volume, in the chapter on arrest,¹²⁶ section 572 of the Code has been considered. Said section provides for a discharge from imprisonment where plaintiff unreasonably delays the trial or the entry of judgment or the issuance of execution. In several cases this section has been applied to body executions by holding that a discharge from imprisonment thereunder could be effected pursuant to the Code provision, but the later cases hold that said provision does not apply to an execution against the person,¹²⁷ except that a defendant discharged from arrest under mesne process, as prescribed in section 572, cannot be arrested on an execution issued on the judgment in the action.¹²⁸

¹²³ Code Civ. Proc. § 111.

¹²⁴ Code Civ. Proc. § 1494. Sufficiency of notice, see *Hoyle v. McCrea*, 26 Misc. 290, 55 N. Y. Supp. 49.

¹²⁵ *Davis v. Bowe*, 118 N. Y. 55.

¹²⁶ Volume 2, p. 1301.

¹²⁷ *Redner v. Jewett*, 72 Hun, 598, 25 N. Y. Supp. 273; *People v. Gill*, 85 App. Div. 192, 83 N. Y. Supp. 135; *Quigley v. Baumann*, 29 Misc. 515, 61 N. Y. Supp. 966.

¹²⁸ Code Civ. Proc. § 572; *Redner v. Jewett*, 72 Hun, 598, 25 N. Y. Supp. 273. See *Schelly v. Zink*, 13 Hun, 538, as to effect of vacating order of discharge.

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— **By order of court.** Sections 2188 to 2218 of the Code which provide for a special proceeding instituted by petition whereby, on executing an assignment, a person imprisoned may be discharged, will be treated of in the volume relating to special proceedings.

§ 2306. **Successive writs.**

Where a judgment debtor has been taken, and remains in custody, by virtue of an execution against his person, another execution cannot be issued, in the same action, against his person or his property, except in a case specially prescribed by law.¹²⁹ A second body execution cannot issue to another county.¹³⁰ If the debtor is privileged from arrest, a new execution may be issued after the privilege has terminated, or defendant may be retaken on the same writ.¹³¹

— **After escape.** If a judgment debtor escapes, after having been taken by virtue of an execution against his person, he may be retaken, by virtue of a new execution against his person; or an execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned, without his having been taken.¹³²

— **After death of debtor.** Where a judgment debtor, who has been taken by virtue of an execution against his person, dies while in custody, a new execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned without his having been taken.¹³³

— **After discharge of debtor after thirty days.** If, after the judgment debtor has been in custody for thirty days or more, the judgment creditor notifies the sheriff to discharge him from custody, another body execution cannot be issued on the judgment but the judgment creditor may otherwise enforce the judgment as if the debtor had not been taken.¹³⁴

¹²⁹ Code Civ. Proc. § 1491.

¹³⁰ *Noe v. Christie*, 15 Abb. Pr. (N. S.) 346.

¹³¹ *Humphrey v. Cumming*, 5 Wend. 90.

¹³² Code Civ. Proc. § 1492; *Eads v. Wynne*, 79 Hun, 463, 29 N. Y. Supp. 983.

¹³³ Code Civ. Proc. § 1493.

¹³⁴ Code Civ. Proc. § 1494.

CHAPTER III.

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§ 2307. Scope of chapter.

There are certain rules which apply to judicial sales in general irrespective of the order or judgment pursuant to which the sale is had. Such rules are collected in this chapter. No mention will be made of rules applicable only to a particular kind of sale such as a foreclosure sale or a sale in an action for partition. The most of the Code rules considered relate to judicial sales pursuant to a judgment in an action relating to real estate. The question of what title a purchaser is compelled to accept is necessarily only briefly considered as is the question of void judicial sales.¹

§ 2308. Definition.

A judicial sale is defined as a sale made as a result of a judicial proceeding, by a person legally appointed by a court of competent jurisdiction, and which becomes absolute only upon confirmation by the court.² The term includes sales under foreclosure, sales in partition suits, sales in actions to admeasure dower, etc., but not an execution sale.

§ 2309. Power of court.

The court has no power, by its order or by judgment, to or-

¹ The subject of void judicial sales has been treated in separate volumes by Mr. Freeman and by Mr. Kleber.

² 12 Enc. Pl. & Pr. 6. As to what is a judicial sale, see, also, Matter of Denison, 114 N. Y. 621. A judgment does not, of itself, transfer title to land. Sedgwick v. Hollenback, 7 Johns. 376; Matter of Van Wyck, 1 Barb. Ch. 565.

der a sale of real estate except as authorized by statute in particular actions and proceedings.³

§ 2310. Notice of sale.

Notice must be given by the officer making the sale, in the same manner as notice of sale of real property under an execution is given,⁴ unless the property is situated wholly or partly in a city in which a daily, semi-weekly or tri-weekly newspaper is published, and, in that case, by publishing notice of the sale in such a paper at least twice in each week for three successive weeks, or in a weekly paper published in a city, once in each of the six weeks, immediately preceding the sale, or in the counties of New York and Kings, in two such daily papers.⁵ The notice of sale under an execution must be posted forty-two days before the sale and a copy of the notice published "in each of the six weeks immediately preceding the sale."⁶ The exception permitting a three weeks' publication of notice of sale of property situated in a city applies only to judicial sales. The phrase "twice in each week for three successive weeks immediately preceding the sale" means that there shall be a period of twenty-one days immediately before the sale, calculated by weeks of seven full days, during each of which weeks two publications shall be made, and this shall occur without reference to the day of the week when publication was commenced. Each week is reckoned as beginning at twelve o'clock on Saturday night and ending at twelve o'clock on the night of the following Saturday.⁷ In other words, it is not necessary that the first publication be twenty-one days prior to the day of sale.⁸ It

³ Van Wyck v. Baker, 10 Hun, 39.

⁴ See ante, § 2252. There is no authority for an order before the sale authorizing the referee to do extra advertising. Baldwin v. Baldwin, 23 Civ. Proc. R. (Browne) 287, 26 N. Y. Supp. 579, note.

⁵ Code Civ. Proc. § 1678. What is a newspaper, see Williams v. Colwell, 26 Civ. Proc. R. (Scott) 66, 18 Misc. 399, 43 N. Y. Supp. 720.

⁶ Code Civ. Proc. § 1434.

⁷ Valentine v. McCue, 26 Hun, 456.

⁸ Id.; Chamberlain v. Dempsey, 13 Abb. Pr. 421.

Notice of Sale.

is not fatal that the notice is not published in all the editions of the paper issued on the day when the notice was published, where no injurious results are shown to have followed from such omission.⁹ No "personal" notice of the sale need be served.¹⁰

The notice of sale properly follows the terms of the decree.^{11, 12} It should describe the property with common certainty and contain nothing which may mislead a bidder or injure the sale.¹³ Though it is proper to insert the title of the action in the notice, its omission will not make the sale irregular.¹⁴ So the notice need not state that the property will be sold in parcels, though the sale is directed by the court to be so made.¹⁵

In addition, the notice of sale, in the first district of the supreme court and in Kings county, must contain other statements set forth in the note.^{15a}

⁹ *Everson v. Johnson*, 22 Hun, 115.

¹⁰ *Collins v. McArthur*, 32 Misc. 538, 67 N. Y. Supp. 460. *Contra*, *Eidlitz v. Doctor*, 24 Misc. 209, 53 N. Y. Supp. 525.

^{11, 12} *Hoffman v. Burke*, 21 Hun, 580.

¹³ *Veeder v. Fonda*, 3 Paige, 94. See Code Civ. Proc. § 1435.

¹⁴ *Brayton v. Smith*, 6 Paige, 489.

¹⁵ A party in interest, who desires that the notice of sale should specify that the property is to be sold in parcels, should make his request in good season. *Hoffman v. Burke*, 21 Hun, 580.

^{15a} The referees or officer making sale of real estate, or of an interest or estate therein, pursuant to any judgment, decree, order or direction of the court, shall, in addition to complying with the requirements of section 1678 of the Code, cause to be published with the notice of sale, a diagram of the property to be sold or in which an interest is to be sold, showing the street or avenue upon which such property is located, its street or avenue number, if any, and specifying the number of feet to the nearest cross street or avenue, and also, where such sale is made to satisfy any lien or charge upon the real property sold, the approximate amount of such lien or charge shall be stated in a note annexed to such notice of sale; and where there are taxes, assessments, or other liens upon the said property which are to be allowed to the purchaser out of the purchase money, or which are to be paid by the referee, the referee or officer making such sale shall also state, at the foot of such notice, the approximate amount of such

Notice of the postponement of the sale must be published in the paper or papers wherein the notice of sale was published.¹⁶ So a second notice of sale is necessary where there is a resale.¹⁷

The death of a party, after publication is commenced, does not require the publication to be commenced anew with the names, as parties, of persons substituted for the deceased.¹⁸

Failure to give notice of sale does not affect the validity of any sale made to a purchaser in good faith, without notice of such omission.¹⁹ So the fact that part of the property ordered to be sold by the judgment, and which was sold, was not included in the notice of sale, does not vitiate the sale, where confirmed on due notice to all parties interested.²⁰

§ 2311. Conduct of sale.

General provisions as to the conduct of judicial sales are found in various chapters of the Code and in the General Rules of Practice. These provisions, together with the common-law rules, will now be considered. The sale must be at public auction to the highest bidder.²¹ The duties of the offi-

charge or lien. An unintentional error, however, in such diagram or in the amount of the lien or charge for which the property shall be sold, or the amount of such taxes or other lien to be allowed to the purchaser upon the sale, shall not invalidate the sale nor authorize the court to relieve the purchaser or to order a new sale. Rule 14 of the trial term rules for the first district and rule of the appellate division for the second district.

¹⁶ Code Civ. Proc. § 1678. *Bicknell v. Byrnes*, 23 How. Pr. 486. But failure to publish notice is not a jurisdictional defect. *Bechstein v. Schultz*, 45 Hun, 191, 19 Abb. N. C. 168.

¹⁷ *Bicknell v. Byrnes*, 23 How. Pr. 486.

¹⁸ *Thwing v. Thwing*, 9 Abb. Pr. 323, 18 How. Pr. 458. See, also, vol. 2, p. 2100.

¹⁹ *Lefevre v. Laraway*, 22 Barb. 167, 170, which holds that the statutory rule applicable to execution sales, applies to judicial sales. So it is held that omission to publish notice of postponement is not a jurisdictional defect. *Bechstein v. Schultz*, 45 Hun, 191, 19 Abb. N. C. 168.

²⁰ *Woodhull v. Little*, 102 N. Y. 165.

²¹ Code Civ. Proc. § 1678.

cer conducting the sale are ministerial. He must obey the directions in the judgment.²² The referee has no power to correct an erroneous description of the premises.²³ The appellate division of the supreme court in the first department may make rules and regulations in relation to the sale in New York or Kings counties.²⁴

— **Who may sell.** Except where special provision is otherwise made by law, real property must be sold by the sheriff of the county where the land is situated or by a referee appointed by the court for that purpose.²⁵ Ordinarily, where the distribution of the proceeds of the sale will be merely a simple ministerial duty, the court should appoint the sheriff to make the sale and thereby save to the parties the increased expense entailed by the appointment of a referee.²⁶ Laws 1876, c. 439, as amended by Laws 1889, c. 167, requires sales of real estate made in the county of Kings under the judgment or decree of any court, with certain exceptions, to be made by the sheriff of that county.²⁷ If the judgment directs a sale by a particular person, the sale cannot be made by another.²⁸ The sheriff has power to sell after the expiration of his term of office.²⁹

²² *People v. Bergen*, 53 N. Y. 404, 409; *Heller v. Cohen*, 154 N. Y. 299, 308. Construction of statements by referee at the sale, see *Banta v. Merchant*, 173 N. Y. 292.

²³ *Heller v. Cohen*, 15 Misc. 378, 36 N. Y. Supp. 668.

²⁴ Rule 62 of the General Rules of Practice.

²⁵ Code Civ. Proc. § 1242. The appellate division in the first department may designate the auctioneers or persons who shall sell in New York or Kings county. Rule 62 of the General Rules of Practice. Postponement of sale where officer appointed to sell does not appear, see p. 3222. Who may be appointed referee, see ante, § 1867.

²⁶ *Race v. Gilbert*, 102 N. Y. 298.

²⁷ Statute is constitutional. *Sproule v. Davies*, 171 N. Y. 277. Regularity of sale by referee, see *Dickinson v. Dickey*, 76 N. Y. 602.

²⁸ *Heyer v. Deeves*, 2 Johns. Ch. 154. Under a decree directing sale by a master residing in the city of New York, a sale by a master residing in Kings county is irregular and void. *Yates v. Woodruff*, 4 Edw. Ch. 700.

²⁹ *Union Dime Sav. Inst. v. Andarson*, 83 N. Y. 174, affirming 19 Hun, 310.

Where a referee is appointed by the court, to sell real property, the court may provide for his giving such security, as the court deems just, for the proper application of the money received upon the sale, or for the payment thereof by the purchaser, directly to the person or persons entitled thereto, or their attorneys.³⁰

— **Time.** The officer must sell within a reasonable time. If he does not, an application to the court to compel him to do so is proper.³¹ The sale is not "business of a court" within a statute prohibiting such business on certain days.³² The sale must be made at public auction between the hour of nine o'clock in the morning and sunset,³³ and lands in the county of New York or the county of Kings must be sold between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed.³⁴ In the city of Buffalo, sales take place between nine and eleven in the forenoon and two and three in the afternoon.³⁵

— **Place.** Except where special provision is otherwise made by law, real property adjudged to be sold must be sold in the county where it is situated. If such real property is situated partly in one county and partly in another and is so circumstanced that a sale of the whole will be most beneficial to the parties, the court rendering judgment may direct in which county the whole of such real property shall be sold.³⁶ Sales in the county of New York, unless otherwise specially directed, must take place at the exchange sales rooms, 111 Broadway.³⁷ Judicial sales in the city of Buffalo are re-

³⁰ Code Civ. Proc. § 1243. In a collateral suit, it cannot be objected that a sale confirmed was made by a master who failed to give official security as required by law. The remedy is by application in original suit, if at all. *Nicholl v. Nicholl*, 8 Paige, 349.

³¹ *Kelly v. Israel*, 11 Paige, 147, 154.

³² *King v. Platt*, 37 N. Y. 155.

³³ Code Civ. Proc. § 1384.

^{34, 35} Rule 62 of the General Rules of Practice.

³⁶ Code Civ. Proc. § 1242. Discretion of officer making sale as to place of sale, see *Haines v. Taylor*, 3 How. Pr. 206.

³⁷ Rule 62 of the General Rules of Practice. But appellate division in first department may change the place at which sales shall be made. *Id.*

quired to take place at the real estate exchange rooms, unless the court ordering the sale otherwise directs, and subject to such regulations as the justices of the supreme court of the eighth district shall establish.³⁸

— **Postponement.** The officer in charge of the sale, may, in his discretion and for good reason, postpone the sale.³⁹ He should do so where, because of lack of bidders or other good cause, he is satisfied that a fair price cannot be obtained for the property.⁴⁰ If the officer appointed to make the sale does not appear at the time and place where the sale has been advertised to take place, the attorney for the plaintiff may postpone or adjourn such sale, not to exceed four weeks, during which time such attorney may make application to the court to have another person appointed to make such sale.⁴¹

— **Terms of sale.** The terms of sale should be attached to the notice of sale. They usually provide for a payment of ten per cent at the time of sale and the payment of the residue on a specified day at which time a deed is to be delivered by the officer making the sale. Payment of liens, either by the purchaser or the officer, is also usually provided for, as is the procedure on a default on the part of the purchaser.⁴² The terms of sale cannot be held to modify the terms of the judgment but are to be construed in connection with it.⁴³ Judicial sales are not to be ordered to be made on credit un-

³⁸ Rule 62 of the General Rules of Practice.

³⁹ *Kelly v. Israel*, 11 Paige, 147. It is proper to postpone on proof that defendant would obtain a loan to pay the judgment (*Mutual Life Ins. Co. v. Kopper*, 1 Month. Law Bul. 76) or where the delay will be equally beneficial to both parties (*Astor v. Romayne*, 1 Johns. Ch. 310), but not merely on account of the existence of war (*Id.*), nor on allegations that the politics and finances of the country are so unsettled that the time is unfavorable. *McGown v. Sandford*, 9 Paige, 290. Adjournment by plaintiff's attorney held irregular. *Shepard v. Whaley*, 19 Civ. Proc. R. (Browne) 381, 13 N. Y. Supp. 532. On adjournment, the future day of sale need not be named. *La Farge v. Van Wagenen*, 14 How. Pr. 54.

⁴⁰ *Bicknell v. Byrnes*, 23 How. Pr. 486.

⁴¹ Code Civ. Proc. § 1678.

⁴² Terms of foreclosure sale, see 6 Abb. Cyc. Dig. 787.

⁴³ *Greene v. Bunzick*, 23 App. Div. 103, 106, 48 N. Y. Supp. 374.

less both parties consent.⁴⁴ The terms of the sale must be made known at the sale, and if the property, or any part thereof, is to be sold subject to the right of dower, charge or lien, that fact must be declared at the time of the sale.⁴⁵

— **Sale in parcels.** The Code provides that “if the property consists of two or more distinct buildings, farms or lots they shall be sold separately, unless otherwise ordered by the court; and provided further that where two or more buildings are situated on the same city lot, they may be sold together.”⁴⁶ If it appears that the property will bring a larger price by being sold together, the court should so order.⁴⁷ But contiguous city lots separated only by imaginary lines constitute a single plot and not several parcels.⁴⁸ Whether the sale shall be in parcels is generally left to the discretion of the referee.⁴⁹ To preserve the rights of the moving party, he

⁴⁴ On plaintiff's motion the sale may be directed to be on credit to the extent of what is due him. *Sedgwick v. Fish*, Hopk. Ch. 594.

⁴⁵ Code Civ. Proc. § 1678.

⁴⁶ Code Civ. Proc. § 1678. The amendment of this section in 1881 substituted the word “shall” for “must” and added the words, “unless otherwise ordered by the court,” after “separately,” and struck out the words, “and access to one is obtained through the other,” after “city lot.” Prior to the amendment it was held that the provision was merely directory and not mandatory. Compare *Wallace v. Feely*, 1 Civ. Proc. R. (McCarty) 126, 61 How. Pr. 225. And in *Hargin v. Wicks*, 92 Hun, 155, 36 N. Y. Supp. 375, it is held that a like provision applicable only to execution sales is merely directory. Whether sale in one lot is ground for setting sale aside, see post, p. 3230.

⁴⁷ *Dobbs v. Niebuhr*, 15 Daly, 52; *Coudert v. De Logerot*, 62 State Rep. 26, 30 N. Y. Supp. 114; *Waterbury v. Tucker & C. Cordage Co.*, 152 N. Y. 610.

⁴⁸ *Mutual Life Ins. Co. v. Bronson*, 22 Wkly. Dig. 452.

⁴⁹ *Underhill v. Underhill*, 4 State Rep. 858. Where premises consist of a single property, bought together, and always controlled by a single person, all lying together, contiguous, and adjoining, and no part in any wise separated from any other part, it is in the discretion of the referee to sell together or in parcels. *Whitbeck v. Rowe*, 25 How. Pr. 403. Though two adjoining lots too narrow to be built on separately may properly be sold as one, it is otherwise of lots of sufficient width or of disconnected lots. *American Ins. Co. v. Oakley*, 9 Paige, 259; followed *Merchants' Ins. Co. v. Hinman*, 3 Abb. Pr. 455. Duty to regard instructions of party, see *Brown v. Frost*, Hoff. Ch. 41.

should apply to the court, before a sale, for a direction to sell in parcels.⁵⁰ The better practice, if the property is susceptible of sale in parcels, is to insert in the terms of sale that the property will be offered in parcels and together, and that it will be struck down to the party bidding the highest price. Then the property is first sold in parcels, and afterwards the whole property is put up and bids solicited, starting at a sum which is the total amount bid for the parcels. If no one bids the property is struck down to the bidders on the parcels; if a higher sum is offered it is struck down to the bidder for any sum in excess of the amount of the bids on the parcels.⁵¹

— **Who may purchase.** The general rule is that any one may purchase at a judicial sale unless he occupies such a position that a purchase by him may be prejudicial to parties interested in the sale netting the highest possible price. In other words, no person can be permitted to purchase where he has a duty to perform that is inconsistent with the character of the purchaser.⁵² The Code provides that “a commissioner, or other officer making a sale, or a guardian of an infant party to the action, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of his ward.”⁵³ It is held, however, that this Code section applies only to a guardian ad litem appointed in the action in which the sale

⁵⁰ *Mutual Life Ins. Co. v. Bronson*, 22 Wkly. Dig. 452.

⁵¹ *Fiero on Special Actions*, vol. 1, p. 614.

⁵² *Torrey v. Bank of Orleans*, 9 Paige, 649. Attorney for plaintiff may purchase. *Holland Trust Co. v. Hogan*, 44 State Rep. 577, 17 N. Y. Supp. 919. An application by an assignee to be allowed to bid at a sale of the property of the assigned estate will not be granted merely on the ground that he claims a debt to be due him from the assigned estate, the indebtedness being disputed by the assignor, and it not having been determined that his claim was a valid one. *Matter of Black*, 13 Daly, 21.

⁵³ A violation of this section is a misdemeanor, and the purchase is void. Code Civ. Proc. § 1679. That guardian cannot purchase, see *Lefevre v. Laraway*, 22 Barb. 167, 175.

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is had, and does not apply to general guardians.⁵⁴ A purchase by a general guardian is not void but merely voidable the same as a purchase by any other trustee.⁵⁵ A purchase by a guardian ad litem in his own name is presumed to be void. To be rendered valid the burden is on the person seeking to uphold the sale to show that the purchase was for the benefit of the ward.⁵⁶ A foreclosure judgment often expressly permits any party to bid at the sale, but if the party purchasing occupies a trust relation to the mortgagor he takes subject to the trust.⁵⁷ But a purchase by a trustee who is a party to the action, where he is largely interested as an individual, where the court authorizes any party to purchase, and where the sale is confirmed by the court with knowledge that the purchaser is a trustee, carries a good title.⁵⁸

— **Memorandum of sale.** Although the sale is binding on the purchaser without any written contract or memorandum of the terms of the sale,⁵⁹ yet it is the better practice to require the purchaser to sign a memorandum of sale.

— **Form of memorandum of sale.**

I, ———, have, on this ——— day of ———, 190—, purchased the premises described in the above annexed printed advertisement of sale, for the sum of ——— dollars, and hereby promise and agree to comply with the terms and conditions of the sale of said premises, as set forth above.

[Date.]

[Signature.]

Received from ——— the sum of ——— dollars, being ten per cent of the amount bid by him for property sold by me, pursuant to the above advertisement of sale.

[Date.]

[Signature.]

⁵⁴ O'Brien v. General Synod of Reformed Church, 10 App. Div. 605, 42 N. Y. Supp. 356; Boyer v. East, 161 N. Y. 580; Munsell v. Munsell, 33 Misc. 185, 68 N. Y. Supp. 329.

⁵⁵ Munsell v. Munsell, 33 Misc. 185, 68 N. Y. Supp. 329.

⁵⁶ O'Donoghue v. Boies, 159 N. Y. 87, 101. Order confirming sale will not render the purchase valid. *Id.*

⁵⁷ Bennett v. Austin, 81 N. Y. 308, 323; Fulton v. Whitney, 66 N. Y. 548.

⁵⁸ Corbin v. Baker, 167 N. Y. 128.

⁵⁹ Andrews v. O'Mahoney, 112 N. Y. 567.

§ 2312. Stay of sale.

The court has power, in its discretion, to temporarily suspend the operation of its judgments or to stay proceedings on them for such time, and on such terms, as it may deem proper,⁶⁰ with or without security.⁶¹ But no order to stay a sale under a judgment in partition, or for the foreclosure of a mortgage, shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.⁶²

§ 2313. Effect of death of party before sale.

A decree made and entered before the death of a party may be executed thereafter notwithstanding the death of the party, and it binds all persons claiming any interest under such party, and where the judgment is to be enforced by a sale of the party's interest in the property and not to be enforced in personam, an application to revive is unnecessary.⁶³

§ 2314. Presumption of regularity.

A judicial sale will be presumed to have been regular,⁶⁴ and it follows that it will be presumed that the officer making the sale did his duty.⁶⁵

⁶⁰ *Sponenburgh v. City of Gloversville*, 42 Misc. 563, 87 N. Y. Supp. 602.

⁶¹ *Carter v. Hodge*, 150 N. Y. 532.

⁶² Rule 67 of the General Rules of Practice. *Asinari v. Volkening*, 2 Abb. N. C. 454.

⁶³ *Hays v. Thomae*, 56 N. Y. 521; *Wing v. De La Rionda*, 125 N. Y. 678; *Wasson v. Hoff*, 27 Misc. 55, 57, 57 N. Y. Supp. 953. See, also, vol. 2, p. 2100.

⁶⁴ Sale in a foreign country. *Grant v. M'Lachlin*, 4 Johns. 34. Presumptions in favor of judicial sales will be liberally indulged where no doubt is raised as to fairness and official character. *American Ins. Co. v. Fisk*, 1 Paige, 90.

⁶⁵ The presumption that an officer did his duty by selling in parcels is not overcome or affected by a recital in the deed that the whole premises were bid off for a gross sum. The sale may, consistently with the recital, have been in parcels. *Leland v. Cameron*, 31 N. Y. 115.

§ 2315. **Setting aside.**

Courts of equity exercise a supervision over sales made under their decrees, which is not always controlled by legal rules, but may be guided by considerations resting in discretion. They may set aside their own sales on grounds insufficient to confer on the objecting party an absolute legal right to a resale.⁶⁶ The general rule is that a resale will not be directed, for the benefit of the persons interested in the proceeds, to protect them against the consequences of their own negligence, where they are adults and perfectly competent to protect their own rights;⁶⁷ but that a sale will be set aside, on slight grounds, where the interests of infants are affected.⁶⁸ The court may, of its own motion, set aside a sale to protect the interests of an infant.⁶⁹ The sale will not be set aside where the moving party has not taken measures to protect himself which he might have taken,⁷⁰ nor where, instead of applying to the court, he makes an agreement with the purchaser, with full knowledge of the facts.⁷¹

Objections to the sale cannot be urged where it is in conformity with the directions in the judgment.⁷² So, as a general rule, technical irregularities are not ground, especially where not prejudicial to the party complaining.⁷³ Ignorance of time and place of sale, on the part of a party to the suit, where there was no fraudulent concealment from him, does not entitle him to have the sale set aside.⁷⁴ So it is not ground that a party allowed by the decree to bid does so without dis-

⁶⁶ *Fisher v. Hersey*, 78 N. Y. 387. If discretionary, order cannot be reviewed in court of appeals. *Id.*

⁶⁷ *American Ins. Co. v. Oakley*, 9 Paige, 259, 261; *Haines v. Taylor*, 3 How. Pr. 206.

⁶⁸ *Prior v. Prior*, 49 Hun, 502, 2 N. Y. Supp. 523. Benefit by resale must be shown. *Stryker v. Storm*, 1 Abb. Pr. (N. S.) 424.

⁶⁹ *Lefevre v. Laraway*, 22 Barb. 167, 175.

⁷⁰ *Wesson v. Chapman*, 76 Hun, 592, 28 N. Y. Supp. 192.

⁷¹ *Toll v. Hiller*, 11 Paige, 228.

⁷² *Winter v. Eckert*, 93 N. Y. 367.

⁷³ *Knight v. Moloney*, 4 Hun, 33.

⁷⁴ *McCotter v. Jay*, 30 N. Y. 80.

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closing that he is bidding as such.⁷⁵ Whether a requirement that the purchaser shall pay twenty-five per cent. on his bid was so unreasonable as to justify a resale depends upon the surrounding circumstances.⁷⁶ Surprise or mistake of a party in interest which is prejudicial to him may be ground,⁷⁷ but a reliance on a void stay of proceedings which was not regarded is not ground,⁷⁸ nor is the vacation of a stay of proceedings obtained by the moving party, too late for him to attend.⁷⁹ The sale may be set aside for fraud or irregularity, even as against a bona fide grantee of the purchaser.⁸⁰ It is ground for setting aside a sale that the officer sold for less than the minimum limit set by the plaintiff, the purchasers being informed of the instructions at the time of the sale and at the time they paid their bid;⁸¹ or an irregularity in accepting bids;⁸² or an unfounded announcement by the officer, tending to lessen the price;⁸³ or the employment of a puffer which is concealed from the purchaser.⁸⁴ So a sale may be set aside where the referee misled the defendants as to a postponement

⁷⁵ *National Fire Ins. Co. v. Loomis*, 11 Paige, 431.

⁷⁶ *Tabor v. Brundage*, 27 Wkly. Dig. 194.

⁷⁷ *Kellogg v. Howell*, 62 Barb. 280. Misapprehension respecting an adjournment of the sale on the part of a judgment creditor present has been held to be sufficient ground for setting the adjourned sale aside. *Corwith v. Barry*, 69 Hun, 113, 53 State Rep. 53, 23 N. Y. Supp. 200.

⁷⁸ *Bodine v. Edwards*, 2 N. Y. Leg. Obs. 231, 3 Ch. Sent. 46.

⁷⁹ *Peck v. New Jersey & N. Y. R. Co.*, 22 Hun, 129.

⁸⁰ *Hale v. Clauson*, 60 N. Y. 339. Such purchasers will, however, be protected. *Ellsworth v. Lockwood*, 9 Hun, 548.

⁸¹ *Requa v. Rea*, 2 Paige, 339. To same effect, *Stahl v. Charles*, 5 Abb. Pr. 348.

⁸² Where the master, having received a bid for \$1,800, followed by one for \$2,000, suspended the sale for a time, and meanwhile the former bidder went away, and the latter retracted his bid, and the master began the sale anew, and sold for \$560, the sale should be set aside. He ought to have adjourned the sale, or put up the premises at \$1,800, or sent for the person who bid that amount. *May v. May*, 11 Paige, 201.

⁸³ *Marsh v. Ridgway*, 18 Abb. Pr. 262.

⁸⁴ *Fisher v. Hersey*, 17 Hun, 370.

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of the sale.⁸⁵ The fact that the purchaser has paid his ten per cent of the bid does not preclude the setting aside of the sale.⁸⁶

The remedy is by a motion in the action and not by an original action for equitable relief.⁸⁷

— **For inadequacy of price.** Mere inadequacy of price, which is not so great as to show fraud or unfairness, is not ground⁸⁸ where the purchaser is a bona fide purchaser.⁸⁹ So a resale will not be ordered merely because of the offer of a higher bid.⁹⁰ It is well settled, however, that where gross inadequacy appears, the court will lay hold of minor irregularities for the purpose of granting relief.⁹¹ For instance, inadequacy of price is ground where coupled with other objections such as fraud,⁹² or mistake,⁹³ or surprise,⁹⁴ or accident,⁹⁵

⁸⁵ *Angel v. Clark*, 21 App. Div. 339, 47 N. Y. Supp. 731.

⁸⁶ *Leslie v. Saratoga Brewing Co.*, 59 App. Div. 400, 69 N. Y. Supp. 581.

⁸⁷ *Brown v. Frost*, 10 Paige, 243; *Gould v. Mortimer*, 16 Abb. Pr. 448, 26 How. Pr. 167; *McCotter v. Jay*, 30 N. Y. 80; *Nicholl v. Nicholl*, 8 Paige, 349.

⁸⁸ *American Ins. Co. v. Oakley*, 9 Paige, 259; *Coudert v. De Logerot*, 62 State Rep. 26, 30 N. Y. Supp. 114. A judicial sale should not be set aside for inadequacy of price, especially after lapse of time, where there is no fraud, unless great benefit in the case at bar requires it. *Burchell v. Voorhis*, 49 How. Pr. 247; *Matter of Rider*, 23 Hun, 91. A sale under a judgment will not be set aside in the absence of fraud, surprise, or well-grounded misapprehension, simply because a higher price can be reasonably anticipated on a resale of the property, even where relief is sought by motion. *McEwan v. Butts*, 48 State Rep. 312, 20 N. Y. Supp. 503. Gross inadequacy sufficient to show fraud, see *Commercial Bank v. Catto*, 13 App. Div. 608, 43 N. Y. Supp. 777.

⁸⁹ *Matter of Fuller*, 35 Hun, 162.

⁹⁰ *Woodhull v. Osborne*, 2 Edw. Ch. 614; *Lefevre v. Laraway*, 22 Barb. 167.

⁹¹ *Chapman v. Boetcher*, 27 Hun, 606.

⁹² *Odell v. Twomey*, 8 Wkly. Dig. 165.

⁹³ *Tripp v. Cook*, 26 Wend. 143.

⁹⁴ *Griffith v. Hadley*, 23 Super. Ct. (10 Bosw.) 587.

⁹⁵ Where the party whose property is sold, or who is liable for a deficiency, is, without negligence on his own part, prevented from attending or being represented at the sale, by unavoidable causes, e. g.,

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or a sale of city lots together instead of separately.⁹⁶ Where inadequacy of price is the ground relied on and the moving party offers to bid a certain sum at a resale, the sale may be set aside notwithstanding the purchaser's offer to convey the property to the moving party for the sum the latter offers to bid.⁹⁷

— **For failure to sell in parcels.** A resale may be ordered because of an abuse of discretion in failing to sell in parcels,⁹⁸ provided a request to sell in parcels was made at the time of the sale.⁹⁹

— **For failure to give notice.** Failure to properly give notice of sale, or of an adjourned sale, is ground for setting aside,¹⁰⁰ but the right to move on such ground may be waived by a failure to raise the objection on a motion to confirm the referee's report.¹⁰¹ The failure to give any notice where property is resold on the failure of the purchaser to pay ten per cent of the bid is ground for setting aside the sale.¹⁰²

— **Discretion of court.** The granting of the motion, where no legal ground exists, is discretionary.¹⁰³ But where there

the incapacity by sickness of his agent, or by an accident delaying him on his way to attend the sale, or by accidental delay of a letter sent by his agent to apprise him of time of sale, and the price brought is greatly inadequate, his application for a resale should be granted on giving full indemnity to the purchaser for expenses and losses. *Thompson v. Mount*, 1 Barb. Ch. 607; *Hoppock v. Conklin*, 4 Sandf. Ch. 582; *King v. Morris*, 2 Abb. Pr. 296; *Williams v. Williams*, 42 How. Pr. 411.

⁹⁶ *Chapman v. Boetcher*, 27 Hun, 606.

⁹⁷ *Commercial Bank v. Catto*, 13 App. Div. 608, 43 N. Y. Supp. 777.

⁹⁸ *Ames v. Lockwood*, 13 How. Pr. 555; *Griffith v. Hadley*, 23 Super. Ct. (10 Bosw.) 587; *Larkin v. Brouty*, 39 State Rep. 879, 15 N. Y. Supp. 509. Person not interested cannot move. *Shuler v. Maxwell*, 38 Hun, 240.

⁹⁹ *McLaughlin v. Teasdale*, 9 Daly, 23.

¹⁰⁰ *Bechstein v. Schultz*, 120 N. Y. 168. See, also, *La Farge v. Van Wagenen*, 14 How. Pr. 54; *Kennedy v. Bridgman*, 27 Misc. 585, 58 N. Y. Supp. 253; *Angel v. Clark*, 21 App. Div. 339, 47 N. Y. Supp. 731; *Everson v. Johnson*, 22 Hun, 115.

¹⁰¹ *Bechstein v. Schultz*, 120 N. Y. 168.

¹⁰² *Lents v. Craig*, 13 How. Pr. 72.

¹⁰³ *Winter v. Eckert*, 93 N. Y. 367; *Hale v. Clauson*, 60 N. Y. 339;

is a legal right, as where the sale is absolutely void for fraud, the court must grant the motion. In such a case there is no discretion to be exercised.¹⁰⁴

— **Time for motion.** The application should be made promptly after discovery of the facts, and, if possible, before the confirmation of the report,¹⁰⁵ though the fact that a deed has been delivered to the purchaser does not necessarily preclude the granting of relief.¹⁰⁶

— **Who may move.** Any person interested in the sale may apply to vacate it,¹⁰⁷ provided his rights are injuriously affected.¹⁰⁸

— **Notice of motion.** Notice of the motion should be given to all parties in interest.¹⁰⁹

— **Motion papers.** The ground relied on should be fully set forth in the moving affidavits, inasmuch as ordinarily the sale will not be set aside except on clear and conclusive evidence.¹¹⁰ A resale will not be ordered merely on affidavits as to speculative value.¹¹¹ If infants seek to set aside a well attended and fairly conducted sale, it should be shown that,

Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co., 119 N. Y. 15, 24.

¹⁰⁴ *Fisher v. Hersey*, 78 N. Y. 387.

¹⁰⁵ Motion denied for laches. *Claffin v. Clark*, 22 Wkly. Dig. 137; *Lockwood v. McGuire*, 57 How. Pr. 266; *Depew v. Dewey*, 2 T. & C. 515. That section 724 of the Code does not apply and that motion may be made after expiration of a year, see *Matter of Fuller*, 35 Hun, 162.

¹⁰⁶ *Crane v. Stiger*, 2 T. & C. 577.

¹⁰⁷ *Brown v. Frost*, 10 Paige, 243.

¹⁰⁸ The moving party need not have a specific lien on the premises. *Goodell v. Harrington*, 76 N. Y. 547.

¹⁰⁹ Compare *Robinson v. Meigs*, 10 Paige, 41. Specification of irregularities relied on, in notice of motion, see *Kellogg v. Howell*, 62 Barb. 280.

¹¹⁰ *Wiedersum v. Naumann*, 10 Abb. N. C. 149. But if fraud is alleged, the court may order a resale upon facts casting such a degree of suspicion upon the fairness of the sale as to render it, in their judgment, expedient under all the circumstances to vacate it, although the alleged fraud may not be clearly established. *Fisher v. Hersey*, 78 N. Y. 387.

¹¹¹ *Barnes v. Stoughton*, 2 T. & C. 675.

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upon a resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased.¹¹² If it is claimed that the bid of the moving party was improperly rejected, he should show that he had the money to pay the ten per cent of the bid at the sale, or that he is pecuniarily responsible, or that some injury has come to him by the sale.¹¹³

— **Order.** Instead of granting a resale, the court sometimes permits a reduction of the bid, where the motion is in behalf of the purchaser.¹¹⁴ Where, before the sale is set aside, the purchaser, who has obtained a deed, gives several mortgages and afterwards a deed of the premises, the question whether the incumbrancers will be bound by an order for a resale depends on whether they are purchasers or incumbrancers in good faith, for value, and without notice.¹¹⁵ Ordinarily the rights of third persons claiming under the purchaser will be saved on ordering a resale.¹¹⁶ Terms may be imposed,¹¹⁷ such as payment of the costs and expenses of the sale,¹¹⁸ and an agreement to pay a specified sum on a resale or that the amount bid will exceed the original sale price.¹¹⁹ On ordering a resale because of inadequacy of price, the court may order the giving of security that a larger price will be obtained on the second sale.¹²⁰ Where the purchaser takes possession and makes improvements after being informed by the officer making the sale that a party has an equitable claim to have the sale vacated and without waiting for the confirma-

¹¹² *Stryker v. Storm*, 1 Abb. Pr. (N. S.) 424.

¹¹³ *Irving Sav. Inst. v. Robinson*, 35 Misc. 449, 71 N. Y. Supp. 193.

¹¹⁴ *Fisher v. Hersey*, 78 N. Y. 387.

¹¹⁵ *Colby v. Rowley*, 4 Abb. Pr. 361.

¹¹⁶ *Duncan v. Dodd*, 2 Paige, 99; *Tripp v. Cook*, 26 Wend. 143; *Gould v. Gager*, 18 Abb. Pr. 32, 24 How. Pr. 440; *Matter of Fuller*, 35 Hun, 162.

¹¹⁷ Costs of adjournment and fees of referee and auctioneer. *Stephens v. Humphreys*, 46 State Rep. 646, 19 N. Y. Supp. 25.

¹¹⁸ *German-American Bank of Rochester v. Dorthy*, 39 App. Div. 166, 57 N. Y. Supp. 172; *German-American Bank of Rochester v. Russell*, 39 App. Div. 646, 57 N. Y. Supp. 171.

¹¹⁹ *Id.*; *Baker v. Baker*, 22 Wkly. Dig. 137.

¹²⁰ *Duncan v. Dodd*, 2 Paige, 99; *Brush v. Shuster*, 3 Abb. N. C. 73.

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tion of the report of sale, he is not entitled to indemnity therefor on the sale being set aside.¹²¹

§ 2316. Grounds for relieving purchaser from his bid.

The purchaser is entitled to a marketable title,¹²² i. e., the title must be one free from reasonable doubt.¹²³ This does not mean that the title must be good beyond a "possibility" of an outstanding claim or title,¹²⁴ but merely that the purchaser can object to the title only when there is a "probability" that some other person has a valid claim or subsisting lien on the premises, not known to the purchaser at the time of the sale nor mentioned in the notice of sale or at the sale.¹²⁵ A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him.¹²⁶ However, the title is not sufficient merely because it is probable the purchaser will never be disturbed in his possession.¹²⁷ The defect must be substantial and not rest upon a mere contingency.¹²⁸ The question as to the materiality of a defect is one

¹²¹ *Requa v. Rea*, 2 Paige, 339.

¹²² A title open to a reasonable doubt is not a marketable title, and the court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of law, in the absence of the party in whom the outstanding right is vested. *Fleming v. Burnham*, 100 N. Y. 1. Question of sufficiency of title on foreclosure sale, see 6 Abb. Cyc. Dig. 788-791.

¹²³ *Crouter v. Crouter*, 133 N. Y. 55; *Nathan v. Hendricks*, 87 Hun, 483, 34 N. Y. Supp. 1016. Title derived under a will (*Thorn v. Sheil*, 15 Abb. Pr. [N. S.] 81), where the will has been construed. *Brown v. Mount*, 38 App. Div. 440, 56 N. Y. Supp. 613. Title based on supposed death of owner. *Ferry v. Sampson*, 112 N. Y. 415; *Cambrelleng v. Purton*, 125 N. Y. 610. Encroachment of buildings on adjoining lands. *Merges v. Ringler*, 34 App. Div. 415, 54 N. Y. Supp. 280; *Harrison v. Platt*, 35 App. Div. 533, 54 N. Y. Supp. 842.

¹²⁴ *Lenehan v. College of St. Francis Xavier*, 30 Misc. 378, 63 N. Y. Supp. 1033.

¹²⁵ Title beyond the possibility of valid claim cannot be required. *Dunham v. Minard*, 4 Paige, 441; *Spring v. Sandford*, 7 Paige, 550; *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. 533.

¹²⁶ *Goodwin v. Crooks*, 58 App. Div. 464, 69 N. Y. Supp. 578.

¹²⁷ *Lee v. Lee*, 27 Hun, 1.

¹²⁸ *Oakley v. Briggs*, 44 State Rep. 397, 17 N. Y. Supp. 751.

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of fact where it depends upon, and is an inference to be drawn from, circumstances.¹²⁹ A purchaser will not be compelled to take a doubtful title, where the questions arising are of sufficient importance to impair the value of the real estate sold, by casting a cloud upon the title, or by subjecting the purchaser to the risk of a contest at law.¹³⁰ If the validity of a purchaser's title depends upon a pure question of law arising on the construction of a will, which question would require grave consideration under the authorities, the court will not determine the question in the absence of the parties in interest, and the purchaser will be relieved.¹³¹ A sale in Kings county by a referee instead of by the sheriff does not relieve the purchaser,¹³² though a failure to file papers necessary to the action may.¹³³ The fact that the auctioneer is interested in the sale as a party to the suit, unknown to the bidders, is ground for relief, though no actual fraud or bad faith is shown.¹³⁴

A title vested by adverse possession is sufficient,¹³⁵ though a title which is defective but which can be cured or corrected by parol evidence to be furnished in the future is insufficient.¹³⁶ The purchaser need not complete where the validity of the title depends on a disputable question of fact.¹³⁷

¹²⁹ *Heller v. Cohen*, 154 N. Y. 299, 309.

¹³⁰ *Argall v. Raynor*, 20 Hun, 267.

¹³¹ *Fleming v. Burnham*, 100 N. Y. 1.

¹³² *Sproule v. Davies*, 171 N. Y. 277.

¹³³ *Waring v. Waring*, 7 Abb. Pr. 472. But proof of service of summons on defendants may be filed nunc pro tunc to avoid purchaser's objection to title, on account of the omission. It would even be sufficient, on a motion to compel him to complete, to show affirmatively that such service had been made. *Bogert v. Bogert*, 45 Barb. 121.

¹³⁴ *Smith v. Harrigan*, 27 Abb. N. C. 322, 40 State Rep. 292, 15 N. Y. Supp. 852.

¹³⁵ *Pell v. Pell*, 65 App. Div. 388, 393, 73 N. Y. Supp. 81; *Heller v. Cohen*, 154 N. Y. 299, 311; *College Point Sav. Bank v. Vollmer*, 44 App. Div. 619, 60 N. Y. Supp. 389; *Grady v. Ward*, 20 Barb. 543.

¹³⁶ *Heller v. Cohen*, 154 N. Y. 299, 306. The purchaser will not be compelled to take property, the title to a portion of which rests on the mere fact of possession for more than twenty years, to show hostility to the record title, and where parol testimony to be furnished in the future may be essential to establish the fact upon which the

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The fact that the purchaser agrees to take title at his own risk does not preclude the granting of relief from his bid where the only title the seller could convey was acquired under a tax lease long since expired.¹³⁸

If the title to any part of lands sold as an entirety, although consisting of several distinct lots, is defective, the purchaser is not bound to accept and pay for any one of the lots; but if the lands are bid off and contracted for as separate and independent parcels, a defect in the title to one parcel will not affect the sale of another parcel.¹³⁹

Knowledge of defects relied on by the purchaser, at the time of the sale, precludes him from asserting such defects as a ground of refusal to complete.¹⁴⁰ Likewise, objections may be waived by an agreement based on a good consideration.¹⁴¹ But purchasing with knowledge of one or more infirmities in the title does not require the purchaser to accept a title with defects unknown to him at the time.¹⁴²

Objections to the title which the owner is able and offers to remove, at the time of performance, furnish no excuse to a purchaser for nonperformance.¹⁴³ But the burden of curing the title is on the party seeking to compel the purchaser to perform,¹⁴⁴ and the defect in the title must be removed within a reasonable time so that the purchaser will have the substantial benefit of his bargain.¹⁴⁵ The purchaser is not bound, though it is within his power, to remedy the defects.¹⁴⁶

validity of the title depends. *Gorman v. Gorman*, 40 App. Div. 225, 57 N. Y. Supp. 1069.

¹³⁷ *Stephens v. Flammer*, 40 Misc. 278, 81 N. Y. Supp. 1064.

¹³⁸ *Davis v. Carroll*, 4 Month. Law Bul. 31.

¹³⁹ *Mott v. Mott*, 68 N. Y. 246.

¹⁴⁰ *Dunlop v. Mulry*, 85 App. Div. 498, 83 N. Y. Supp. 477, 1104; *Riggs v. Pursell*, 66 N. Y. 193; *Coates v. Fairchild*, 14 Wkly. Dig. 189; *Stephens v. Humphryes*, 73 Hun, 199, 25 N. Y. Supp. 946. Knowledge of agent is knowledge of principal. *Rogers v. James*, 11 Wkly. Dig. 574.

¹⁴¹ *Hubbard v. Housley*, 43 App. Div. 129, 59 N. Y. Supp. 392.

¹⁴² *Matter of Fales*, 33 App. Div. 611, 53 N. Y. Supp. 1046.

¹⁴³ *Strauss v. Benheim*, 28 Misc. 660, 59 N. Y. Supp. 1054.

¹⁴⁴ *Crouter v. Crouter*, 133 N. Y. 55, 63.

¹⁴⁵ *Jackson v. Edwards*, 22 Wend. 498; *Rice v. Barrett*, 99 N. Y. 403; *Toole v. Toole*, 112 N. Y. 333; *Darrow v. Horton*, 6 State Rep. 718.

Where substantial justice requires, the court may decree performance and award compensation for comparatively slight diminution of title or power of enjoyment.¹⁴⁷

— **Irregularities in judgment.** Irregularities in the judgment, which affect the jurisdiction of the court over the parties or the subject-matter are ground for refusing to complete,¹⁴⁸ but mere errors, or irregularities which are not jurisdictional, cannot be urged.¹⁴⁹ Failure to serve summons on necessary parties relieves the purchaser,¹⁵⁰ and defects in the affidavit on which an order for the publication of summons was obtained may invalidate the judgment so as to relieve the purchaser.¹⁵¹

— **Nonjoinder of necessary parties.** The failure to join as parties persons who are necessary parties is ground for refusing to complete,¹⁵² but making persons parties as unknown persons, in partition, is sufficient.¹⁵³

¹⁴⁶ *Heller v. Cohen*, 154 N. Y. 299, 310.

¹⁴⁷ *Merges v. Ringler*, 34 App. Div. 415, 54 N. Y. Supp. 280.

¹⁴⁸ See *Smith v. Secor*, 157 N. Y. 402; *Kirk v. Kirk*, 137 N. Y. 510; *Matter of Field*, 131 N. Y. 184; *Rockwell v. Decker*, 33 Hun, 343; *Adami v. Backer*, 29 Misc. 93, 60 N. Y. Supp. 683. A purchaser at a judicial sale, under a judgment within jurisdiction of the court, cannot refuse to complete his purchase on the ground that directions of the judgment, and the sale pursuant thereto, were irregular and unauthorized by law, in respect to the selection of the officer who made the sale. *Gaskin v. Anderson*, 55 Barb. 259. Where there is reason to believe that plaintiff died before judgment entered in his favor, the judgment is questionable, and a purchaser cannot be compelled to take title. *Gerry v. Post*, 13 How. Pr. 118. Delay in entering judgment will not excuse a purchaser at a partition sale, particularly in the absence of proof that any loss has been sustained thereby. *Frost v. Hirschberg*, 17 Wkly. Dig. 224.

¹⁴⁹ *De Forest v. Farley*, 62 N. Y. 628.

¹⁵⁰ *McKenna v. Duffy*, 64 Hun, 597, 19 N. Y. Supp. 248. See, also, *O'Connor v. Felix*, 147 N. Y. 614.

¹⁵¹ *Bixby v. Smith*, 3 Hun, 60.

¹⁵² *Miller v. Wright*, 109 N. Y. 194; *Hirsch v. Livingston*, 3 Hun, 9; *Hecker v. Sexton*, 6 State Rep. 680. Compare *Carroll v. McKaharay*, 35 App. Div. 582, 55 N. Y. Supp. 113.

¹⁵³ *Goodwin v. Crooks*, 58 App. Div. 464, 69 N. Y. Supp. 578.

— **Existence of liens.** The existence of outstanding claims or incumbrances, not known to the purchaser nor mentioned in the notice of sale or at the sale, is ground for refusing to complete.¹⁵⁴ An incumbrance on the land justifies a refusal where it diminishes the value of the premises.¹⁵⁵ Though the purchaser is a party to the suit he is not compelled to take a title incumbered by a mortgage, the mortgagee not being made a party to the action.¹⁵⁶ But it is not sufficient ground for relieving a purchaser of property which the terms of sale described as being subject to a mortgage for a specified amount, that such mortgage is by its terms payable in gold coin.¹⁵⁷

— **False representations.** False representations by the plaintiff, or by the defendant,¹⁵⁸ or by the auctioneer,¹⁵⁹ where deceiving the purchaser, is ground for relieving him.

— **Mistake of purchaser.** Though the rule of caveat emptor applies generally to judicial sales,¹⁶⁰ yet the purchaser may be relieved from his bid where made on an entire misapprehension of the facts,¹⁶¹ provided he is not chargeable with negligence.¹⁶²

¹⁵⁴ Mahoney v. Allen, 18 Misc. 134, 42 N. Y. Supp. 11; Merchants' Bank v. Thomson, 55 N. Y. 7; Crocker v. Gollner, 47 State Rep. 887, 20 N. Y. Supp. 17. But a purchaser is not discharged by reason of a court-yard agreement, binding upon the premises, which is not shown to impair their value. Riggs v. Pursell, 66 N. Y. 193. A purchaser is not discharged by an agreement against nuisances which does not impair the value. Riggs v. Pursell, Id. A purchaser will not be compelled to take a title subject to a claim merely because the claimant may come in and participate in the surplus arising on the sale, and thus preclude himself from asserting his claim against the premises, if he is not bound to do so, but has the right to redeem on payment of the amount due on the incumbrance. Weeks v. Tomes, 16 Hun, 349.

¹⁵⁵ Ray v. Adams, 44 App. Div. 173, 60 N. Y. Supp. 663.

¹⁵⁶ Mahoney v. Allen, 18 Misc. 134, 42 N. Y. Supp. 11.

¹⁵⁷ Blanck v. Sadlier, 153 N. Y. 551; Hartigan v. Smith, 19 App. Div. 173, 45 N. Y. Supp. 1012.

¹⁵⁸ Mulks v. Allen, 12 Wend. 253; American Ins. Co. v. Simers, 3 Ch. Sent. 70.

¹⁵⁹ Representations by auctioneer as to location of lot. Fairchild v. Fairchild, 59 How. Pr. 351.

¹⁶⁰ Wallace v. Berdell, 41 Hun, 444.

¹⁶¹ Dunn v. Herbs, 56 Hun, 457, 10 N. Y. Supp. 34.

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— **Mistakes in notice of sale.** Mistakes in the notice of sale, where they mislead the purchaser to his detriment, are ground for relief.¹⁶³ But an error in the notice of sale is not ground where no one could have been misled by the error.¹⁶⁴ Error in the notice of sale, in omitting to describe a portion of the lands directed to be sold, does not create a defect in the title, where the sale is afterwards confirmed.¹⁶⁵ So failure to publish notice of the adjournment of the sale is not a jurisdictional defect available to a purchaser several years after the confirmation of the sale.¹⁶⁶

— **Inability to obtain possession.** If immediate right of possession is denied, the purchaser cannot be compelled to take title.¹⁶⁷ A purchaser must be able to get possession by virtue of the decree; and if independent proceedings are necessary in order to secure him such possession, he is not required to take them or to complete his purchase.¹⁶⁸

— **Change of conditions since sale.** A slight injury to the property, which can easily be repaired, and the expense of which the owner is willing to bear, is not ground for relieving the purchaser.¹⁶⁹ For instance, the purchaser may be compelled to complete his purchase where a dilapidated build-

¹⁶² *Dennerlein v. Dennerlein*, 111 N. Y. 518.

¹⁶³ *Smyth v. McCool*, 22 Hun, 595; *Bradley v. Leahy*, 54 Hun, 390, 7 N. Y. Supp. 461; *Kingsland v. Fuller*, 157 N. Y. 507. But a purchaser at a partition sale, where the lands were described as containing thirty-one acres more or less, was held to his purchase, although there were in fact but twenty-four acres, notwithstanding that there was a hand-bill issued prior to the sale referring to the property as containing thirty-one acres, and omitting the words "more or less"; the court holding that the purchaser was chargeable with negligence in failing to obtain full and accurate information, there being sufficient ambiguity in the notice to call for a survey if definite knowledge was required. *Dennerlein v. Dennerlein*, 111 N. Y. 518.

¹⁶⁴ *Kingsland v. Fuller*, 157 N. Y. 507.

¹⁶⁵ *Woodhull v. Little*, 102 N. Y. 165.

¹⁶⁶ *Bechstein v. Schultz*, 45 Hun, 191.

¹⁶⁷ *Welsh v. Schoen*, 59 Hun, 356, 13 N. Y. Supp. 71; *Remsen v. Reese*, 72 Hun, 370, 25 N. Y. Supp. 350.

¹⁶⁸ *Kopp v. Kopp*, 48 Hun, 532, 15 State Rep. 967, 1 N. Y. Supp. 261.

¹⁶⁹ *Aspinwall v. Balch*, 4 Abb. N. C. 193.

ing of little value, as compared with the land, is damaged in a small sum by fire.¹⁷⁰ But where a building on the premises is destroyed by fire and the local authorities refuse to permit another building to be erected in its place, the purchaser is relieved.¹⁷¹

§ 2317. Procedure where purchaser fails to perform.

Where the purchaser, after paying ten per cent of the bid, refuses to further perform, either one of two courses is open, i. e., to resell and hold him for the deficiency or to move against him to compel him to pay the balance. The purchaser, himself, also may move to be relieved from his bid. The two latter proceedings are held to be special proceedings.¹⁷² Where a purchaser fails to complete his purchase, it is a matter of judicial discretion whether to compel him to specifically perform his bid by contempt proceedings or to direct a resale on notice to him and hold him liable for the deficiency, with interest and costs.¹⁷³ The grounds for relieving a purchaser from his bid are identical with those which will preclude the granting of the motion to compel him to complete his purchase.

The rights and liabilities of the purchaser do not grow out of a contract but arise from the submission to the jurisdiction of the court in the matters relating to the sale. A purchaser, although a stranger to the judgment, by his purchase submits himself to the jurisdiction of the court, in respect to the sale and purchase.¹⁷⁴ It follows that an assignee of the bid may be compelled to perform.¹⁷⁵

— **Entry of judgment as condition precedent.** Where real property, sold by virtue of a judgment, rendered in an

¹⁷⁰ It is sufficient that premises be repaired or adequate compensation is tendered for the injury. *Aspinwall v. Balch*, 7 Daly, 200.

¹⁷¹ *Harrigan v. Golden*, 41 App. Div. 423, 58 N. Y. Supp. 726.

¹⁷² *Parish v. Parish*, 175 N. Y. 181, 184.

¹⁷³ *Rowley v. Feldman*, 84 App. Div. 400, 82 N. Y. Supp. 679.

¹⁷⁴ *Hale v. Clauson*, 60 N. Y. 339.

¹⁷⁵ *Archer v. Archer*, 155 N. Y. 415. The bid may be assigned. *Proctor v. Farnam*, 5 Paige, 614.

action for partition, for dower, or to foreclose a mortgage on real property, is situated in a county, other than that in which the judgment is entered, the judgment must be also entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase-money, or to accept a deed. The clerk of the latter county must enter it in the judgment-book kept by him, upon filing with him a copy thereof, certified by the clerk with whom it is entered.¹⁷⁶

— **Order to pay bid.** The plaintiff in the original action does not stand in such a relation to the purchaser at the sale as to be entitled to enforce his purchase by an "action" for specific performance, but his remedy must be by motion to compel the completion of the purchase.¹⁷⁷ The motion is substantially a summary proceeding to compel the specific performance on the part of the purchaser, and to a very considerable extent it stands on the same footing and is to be decided by the same equitable considerations as an action for that purpose.¹⁷⁸ Where the purchaser is in possession under a decree not fully executed, mere lapse of time is no answer to the motion.¹⁷⁹ Notice of the application should be given to defendant.¹⁸⁰

The court has no power to allow a purchaser to complete his purchase as to the unobjectionable part of the property sold, for a pro rata consideration.¹⁸¹

If the purchaser is relieved from his bid, he is entitled to

¹⁷⁶ Code Civ. Proc. § 1677.

¹⁷⁷ *Burton v. Linn*, 21 App. Div. 609, 47 N. Y. Supp. 835; *Stokes v. Hoffman House*, 167 N. Y. 554, 559. The enforcement of the specific performance of a contract to purchase real estate rests in the discretion of the court, but it is a discretion to be exercised upon settled rules and not arbitrarily, and where the case is one in which the proceeding is against the purchaser at a judicial sale to compel him to make good his bid, the discretion may be influenced differently than in a case where the action is upon a private contract. *Crane v. Robinson*, 19 Misc. 40, 76 State Rep. 874, 42 N. Y. Supp. 874.

¹⁷⁸ *Burton v. Linn*, 21 App. Div. 609, 610, 47 N. Y. Supp. 835.

¹⁷⁹ *Cazet v. Hubbell*, 36 N. Y. 677.

¹⁸⁰ *Robinson v. Meigs*, 10 Paige, 41.

¹⁸¹ *Thompson v. Schmieder*, 38 Hun, 504.

receive a return of his deposit, with interest from the time the sale was to be completed, and expenses of investigating the title, and costs of his motion to be discharged.¹⁸² But where a purchaser is relieved from a mistake of fact on his part, it may be conditioned on his indemnifying against the expense of a resale.¹⁸³

The order to pay may be enforced by contempt proceedings, even after a resale,¹⁸⁴ though it has also been held that an execution will lie to enforce payment.¹⁸⁵ Inability to pay the money is no defense to contempt proceedings.¹⁸⁶

The order is appealable to the court of appeals where questions of law may be decided but not questions involving the exercise of discretion.¹⁸⁷

— **Order for resale.** If a resale of the premises is ordered, care should be taken to give the purchaser notice of the motion for a resale,¹⁸⁸ and the terms of sale should be the same as those of the first sale.¹⁸⁹ Unless this is done, the purchaser cannot be held liable for the deficiency. Notice of the application for a resale should also be given to a defendant who has appeared and has an interest in the property, or its proceeds.¹⁹⁰ In addition to being charged with the deficiency, with interest and costs,¹⁹¹ the first purchaser may, in addition, be charged with taxes imposed in the meantime,¹⁹²

¹⁸² *Rogers v. McLean*, 31 Barb. 304, 10 Abb. Pr. 306; *Morris v. Mowatt*, 2 Paige, 586.

¹⁸³ *Vingut v. Vingut*, 42 State Rep. 787, 17 N. Y. Supp. 159.

¹⁸⁴ *Rowley v. Feldman*, 84 App. Div. 400. Note on enforcement by contempt proceedings, see 13 Ann. Cas. 179.

¹⁸⁵ *Leslie v. Saratoga Brewing Co.*, 33 Misc. 118, 67 N. Y. Supp. 222; *Betz v. Buckel*, 30 Abb. N. C. 278, 24 N. Y. Supp. 487.

¹⁸⁶ *Burton v. Linn*, 21 App. Div. 609, 612, 47 N. Y. Supp. 835.

¹⁸⁷ *Parish v. Parish*, 175 N. Y. 181, 184; *Crocker v. Gollner*, 135 N. Y. 662 (mem.).

¹⁸⁸ *Anthon v. Batchelor*, 22 Abb. N. C. 423, 16 Civ. Proc. R. (Browne) 304, 5 N. Y. Supp. 798.

¹⁸⁹ *Riggs v. Pursell*, 74 N. Y. 370; *Ray v. Adams*, 44 App. Div. 173, 60 N. Y. Supp. 663. Compare *Bibby v. Gouverneur*, 4 Edw. Ch. 535.

¹⁹⁰ *Robinson v. Meigs*, 10 Paige, 41.

¹⁹¹ *Bicknell v. Byrnes*, 23 How. Pr. 486; *Miller v. Collyer*, 36 Barb. 250; *Chase v. Chase*, 15 Abb. N. C. 91.

¹⁹² *Ruhe v. Law*, 8 Hun, 251.

but not with the expense of proceedings to cure an irregularity in the first sale.¹⁹³ The ten per cent deposit may be applied to the payment of any deficiency, notwithstanding the bid has been assigned.¹⁹⁴ But if the ten per cent deposit is more than sufficient to cover the loss on a resale, a judgment creditor of the person in whose favor the sale is made is not entitled to the surplus.¹⁹⁵ A bidder who offers a check or a draft for the ten per cent of his bid, and promises, if a day's adjournment is granted, to produce the cash, cannot be made liable for the difference between his bid and the price on a resale, where the referee making the sale refuses to accept the check or draft and immediately resells after the first purchaser has offered to withdraw his bid.¹⁹⁶ So where the terms of sale reserved the right to the master to keep the bidding open until ten per cent. was paid, and the bidder to whom the premises were struck off refused to pay the deposit and sign the contract, there was no sale, and no order for a resale was necessary.¹⁹⁷

§ 2318. Application of proceeds.

“Where a judgment, rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums necessary to make those payments and redemptions are deemed expenses of the sale.”¹⁹⁸ It has been held that this Code sec-

¹⁹³ Knight v. Moloney, 4 Hun, 33.

¹⁹⁴ Mead v. Brunner, 6 State Rep. 38, 25 Wkly. Dig. 407.

¹⁹⁵ Richardson v. Searles, 37 Misc. 33, 74 N. Y. Supp. 771.

¹⁹⁶ Leslie v. Saratoga Brewing Co., 59 App. Div. 400, 69 N. Y. Supp. 581.

¹⁹⁷ Hewlett v. Davis, 3 Edw. Ch. 338.

¹⁹⁸ Code Civ. Proc. § 1676. Construction of terms of sale, see Greene v. Bunzick, 23 App. Div. 103, 48 N. Y. Supp. 374. When it is proper

tion was intended solely for the benefit of the purchaser.¹⁹⁹ If the referee does not pay such claims, the purchaser should produce proof thereof before the referee; but where the order of sale requires the referee to pay all existing liens before paying over the purchase money the purchaser does not waive his right to have the liens paid out of the purchase money because he fails to produce such proof.²⁰⁰ Although the terms of sale permit the purchaser to pay off the liens, and retain the sum out of the purchase money, he is not bound to do so, but may pay the whole price and require the referee to execute the judgment.²⁰¹ If the referee does not pay off the liens on the property, where it is his duty so to do, the purchaser may sue him for the amount the purchaser is compelled to pay to cancel the lien.²⁰² If the referee is in doubt as to whether he should pay a claim, he should apply to the court for its direction.²⁰³ If a referee irregularly sells property free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the lien, as directed by the decree, the purchasers cannot be compelled to pay into court the amount of the lien, in addition to their bid; but if the terms of sale were prejudicial to any party the remedy is an application for a resale.²⁰⁴ The officer is responsible for the purchase money which has come into his hands.²⁰⁵

§ 2319. Deed.

On making the final payment, the officer conducting the sale

to order sale subject to such liens, see *Morgan v. Fullerton*, 9 App. Div. 233, 41 N. Y. Supp. 465.

¹⁹⁹ *Morgan v. Fullerton*, 9 App. Div. 233, 234, 41 N. Y. Supp. 465.

²⁰⁰ *Easton v. Pickersgill*, 55 N. Y. 310.

²⁰¹ If the purchaser claims that he has paid off admitted prior liens, and tenders the balance of the purchase money, an objection to the sufficiency of the proof of the payment must be made by the referee, if at all, at the time of the tender. *People v. Bergen*, 53 N. Y. 404. If the referee refuses to pay off or allow such prior liens, the court may compel him to do so. *Id.*

²⁰² *Weseman v. Wingrove*, 85 N. Y. 353.

²⁰³ *Easton v. Pickersgill*, 55 N. Y. 310, 316.

²⁰⁴ *Hotchkiss v. Clifton Air Cure*, 2 Abb. Dec. 406.

²⁰⁵ *Van Tassel v. Van Tassel*, 31 Barb. 439.

Deed. Title.

must deliver to the purchaser a deed of the premises.²⁰⁶ If the deed is not ready at the time fixed for its delivery, the purchaser should move for leave to pay the money into court or to compel the completion of the sale.²⁰⁷

A conveyance of property sold pursuant to a judgment which specifies the particular party or parties whose right, title, or interest is directed to be sold, must distinctly state, in the granting clause thereof, whose right, title, or interest was sold and is conveyed, without naming in that clause any of the other parties to the action; otherwise, the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages which the purchaser sustains by the omission, whether he accepts or refuses to accept it.²⁰⁸ The description of the premises must be certain²⁰⁹ but certainty to a common intent is sufficient.²¹⁰ If the deed is ambiguous, proof as to the intent of the sheriff as to the premises to be conveyed is incompetent.²¹¹ The conveyance is effectual to pass the right, title, or interest of a party, adjudged to be sold.²¹² But the deed passes only property directed to be sold by the judgment notwithstanding it purports to cover other property.²¹³

§ 2320. Title.

The purchaser may enter peaceably.²¹⁴ He takes subject to any existing liens,²¹⁵ unless the person holding such lien is estopped, by his silence, as against the purchaser, from en-

²⁰⁶ Code Civ. Proc. § 1242.

²⁰⁷ *Clason v. Corley*, 7 Super. Ct. (5 Sandf.) 447.

²⁰⁸ Code Civ. Proc. § 1244. Proper form of such clause in a referee's deed on foreclosure, see *Randell v. Von Ellert*, 4 Abb. N. C. 88, 12 Hun, 577.

²⁰⁹ *Peck v. Mallams*, 10 N. Y. (6 Seld.) 509.

²¹⁰ *Dygert v. Pletts*, 25 Wend. 402.

²¹¹ *Mason v. White*, 11 Barb. 173.

²¹² Code Civ. Proc. § 1242.

²¹³ *Heller v. Cohen*, 154 N. Y. 299, 308; *Laverty v. Moore*, 33 N. Y. 658.

²¹⁴ *McDougall v. Sticher*, 1 Johns. 42; *Orser v. Storms*, 9 Cow. 687.

²¹⁵ *Buttrou v. Tibbitts*, 10 Abb. N. C. 41.

forcing such lien.²¹⁶ If a third person is in open possession of the premises sold, the purchaser takes subject to the rights of the person in possession.²¹⁷ If the sale is under a void judgment, no title passes.²¹⁸ There is no warranty of title.²¹⁹ A sale subject to specified incumbrances precludes the purchaser from disputing the validity of such incumbrances.²²⁰ Title does not vest until delivery of the deed.²²¹ A purchaser who takes possession before confirmation, and with notice of facts for which a resale is subsequently ordered, will not be allowed for improvements which he makes meanwhile.²²²

§ 2321. Obtaining possession.

The court may order that possession be delivered to the purchaser. In foreclosure suits this is usually accomplished by a writ of assistance. Matters relating to such writ will be considered in the chapter on foreclosure. The Code provides as follows: "Where a judgment * * * allots to any person a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed * * * that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto,

²¹⁶ But one having a lien on property sold under foreclosure does not, by his silent presence at the sale, if no announcement as to liens is made, become estopped thereby from setting up his lien against the purchaser, especially where the facts become fully known to the latter before he completes his purchase. *Frost v. Koon*, 30 N. Y. 428.

²¹⁷ *Bell v. Gittere*, 14 State Rep. 61.

²¹⁸ See *Place v. Riley*, 98 N. Y. 1.

²¹⁹ *Wallace v. Berdell*, 41 Hun. 444.

²²⁰ *Horton v. Davis*, 26 N. Y. 495. Compare, however, *Carpenter v. Simmons*, 24 Super. Ct. (1 Rob.) 360.

²²¹ *Harrigan v. Golden*, 41 App. Div. 423, 58 N. Y. Supp. 726; *Strong v. Dollner*, 4 Super. Ct. (2 Sandf.) 444; *Aspinwall v. Balch*, 4 Abb. N. C. 193.

²²² *Requa v. Rea*, 2 Paige, 339.

the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it was an execution for the delivery of the possession of the property.’²²³

§ 2322. Redemption.

The right in law to redeem lands from sale exists only where given by statute. In equity, the general rule is that where all the parties are before the court and the sale is to be made pursuant to its decree, and by an officer appointed by it for the purpose, the right of redemption will not be allowed except by command of the statute.²²⁴

§ 2323. Compensation of referee.

Section 3297 of the Code provides as follows: “The fees of a referee appointed to sell real property, pursuant to a judgment in an action, are the same as those allowed to the sheriff, and he is allowed the same disbursements as the sheriff.”²²⁵ Where a referee is required to take security upon a sale, or to distribute or apply, or ascertain and report upon the distribution or application of, any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed, or applied, allowed by law to an executor or administrator for receiving and paying out money.²²⁶ But commissions shall not be allowed to him

²²³ Code Civ. Proc. § 1675.

²²⁴ *Crisfield v. Murdock*, 127 N. Y. 315.

²²⁵ Fees of sheriff, see Code Civ. Proc. § 3307, subds. 7, 11. Fee of referee for drawing the deed is chargeable to the grantee and not to the fund. *Race v. Gilbert*, 102 N. Y. 298. While referee appointed in mortgage foreclosure proceedings cannot properly claim the fee for drawing a deed to the purchaser, as that is chargeable to the grantee, but where plaintiff bid in the property, a fee of \$5 for drawing each bid will be allowed. *Sadler v. Lyon*, 62 State Rep. 527, 24 Civ. Proc. R. (Scott) 105, 31 N. Y. Supp. 141.

²²⁶ Payment of the money to the parties entitled to receive it, under the decree, is a “distribution” (*Race v. Gilbert*, 102 N. Y. 298),

on a sum bidden by a party to the action, and applied on that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars unless the property sold for ten thousand dollars or upwards,²²⁷ in which event the referee may receive such additional compensation as to the court may seem proper,²²⁸ or in any other case five hundred dollars."²²⁹ This Code section also applies to the commissioners of a referee to sell property in the county of New York.²³⁰ Fees in excess of those prescribed cannot be awarded,²³¹ even where there has been an agreement to pay a larger fee.²³² A referee to sell in foreclosure is not entitled to double fees, because two mortgages on separate pieces of property are foreclosed, it being one and the same action.²³³ So he is entitled to the fee for one sale only in one action, although a resale be ordered, but may be allowed whatever disbursements are properly in-

though it is otherwise as to money paid into court, over and above the amount applied pursuant to the decree. *Maher v. O'Conner*, 61 How. Pr. 103, 1 Civ. Proc. R. (McCarty) 158.

²²⁷ In order to authorize the award of more than fifty dollars, the referee must have actually received in cash, and become accountable for, ten thousand dollars or more. *Hosmer v. Gans*, 14 Misc. 229, 35 N. Y. Supp. 471. The application for additional compensation will not be granted solely on the ground that the property sold for a larger sum, part of which was paid by delivery of a bond and mortgage. *Metropolitan L. Ins. Co. v. Bendheim*, 59 N. Y. Supp. 793.

²²⁸ The award of additional compensation is discretionary and will be granted only where fifty dollars appears to the court to be inadequate. *Dime Sav. Bank v. Pettit*, 59 N. Y. Supp. 794.

²²⁹ Referee's compensation for sale in dower action cannot exceed \$500. *Schierloh v. Schierloh*, 22 Misc. 637, 49 N. Y. Supp. 1062.

²³⁰ *Maher v. O'Conner*, 61 How. Pr. 103, 1 Civ. Proc. R. (McCarty) 158; *Keim v. Keim*, 42 App. Div. 88, 59 N. Y. Supp. 366; *Harrington v. Bayles*, 40 Misc. 388, 82 N. Y. Supp. 379, which distinguishes between "commissions" and "fees."

²³¹ *Ward v. James*, 8 Hun, 526.

²³² *Brady v. Kingsland*, 5 Civ. Proc. R. (Browne) 413.

²³³ *Sadler v. Lyon*, 62 State Rep. 527, 24 Civ. Proc. R. (Scott) 105, 31 N. Y. Supp. 141.

curred.²³⁴ A referee to sell in foreclosure is entitled to payment of his expenses incurred in carrying out the orders of the court, e. g., expenses incurred for advertising the sale; and neither the satisfaction of the mortgage or of the judgment can affect his rights.²³⁵ Where the referee in partition paid to plaintiff's attorney costs awarded in interlocutory judgment, taking a receipt by which such attorney agreed to pay them back if the purchaser refused to complete the purchase, and he was subsequently relieved therefrom, and the referee was compelled to return the deposit, he can, by action, recover his fees and disbursements from the plaintiffs, but not the costs so paid.²³⁶

²³⁴ *Caryl v. Stafford*, 69 Hun, 318, 23 N. Y. Supp. 534; *Walbridge v. James*, 16 Hun, 8.

²³⁵ *Allen v. Williamson*, 21 Abb. N. C. 391.

²³⁶ *Flynn v. Kennedy*, 62 Hun, 26, 16 N. Y. Supp. 361.

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§ 2324. Nature and purpose.

Where property of a judgment debtor, upon which an execution might be levied, cannot be found, and it is believed that such property exists, or where property he is known or believed to possess cannot be reached by execution, the statute authorizes a summary method of procedure equitable in its nature and an available substitute for a creditor's suit, by which the creditor may ascertain the true situation, and, upon the discovery of property, have the same appropriated to the satisfaction of his judgment. The remedy thus provided is purely statutory, offering a concurrent remedy with the equitable method mentioned, and governed, except as restricted or limited by the particular statute, by the same principles.¹ Supplementary proceedings perform the office of bills in equity² to enable a creditor to ascertain whether his judgment debtor has any property applicable to the satisfaction of the judgment, either in his possession or control or in the possession or control of another. While a substitute for a creditor's suit, it is not intended entirely to supersede such practice and resort may still be had to the old remedy.³ The service of the order takes the place of the commencement of a suit by a cred-

¹ *Owen v. Dupignac*, 9 Abb. Pr. 180, 17 How. Pr. 512; *Smith v. Mahony*, 3 Daly, 285. Of course, the statute governs and acts as a limitation. *Maass v. McEntegart*, 20 Misc. 676, 46 N. Y. Supp. 534.

² *Bryant v. Grant*, 87 Hun, 68, 67 State Rep. 639, 33 N. Y. Supp. 957.

³ *Barnes v. Levy*, 23 Civ. Proc. R. (Browne) 254, 29 N. Y. Supp. 1076.

itor's bill and it gives the judgment creditor a lien on the equitable assets of the judgment debtor in the same manner. The proceedings are not intended to take the place of an execution against property but merely to supplement such remedy by reaching assets which an execution could not touch.⁴ A supplementary proceeding is a remedial process and a liberal construction should be indulged to support it.⁵ Supplementary proceedings are also proper to collect taxes,⁶ or to enforce the decree of a surrogate.⁷

§ 2325. Special proceedings.

Supplementary proceedings, whether to compel an examination of the judgment debtor or of a third person, are special proceedings and not a part of the action,⁸ though they were formerly held to be proceedings in the cause.

§ 2326. Code provisions.

The Code provisions relating to supplementary proceedings are to be found in title twelve of chapter seventeen of the Code. They are to a considerable extent the same as the provisions of the old Code but there have been so many changes, not only by the new Code as originally enacted but also by subsequent amendments thereof, that any decision rendered under the old Code should not be regarded as a precedent unless it is clear that it has not been modified or overruled by subsequent statutory enactments.

§ 2327. Three remedies.

The Code provides for three distinct remedies, as follows:

1. An order made or a warrant issued against a judgment debtor, after the return of an execution.

⁴ *Moyer v. Moyer*, 7 App. Div. 523, 40 N. Y. Supp. 258.

⁵ *Matter of Gough*, 31 App. Div. 307, 52 N. Y. Supp. 627; *Crouse v. Wheeler*, 33 How. Pr. 337.

⁶ Tax Law, §§ 77, 259. Village Law, § 126.

⁷ Code Civ. Proc. § 2554.

⁸ Code Civ. Proc. § 2433; *Maass v. McEntegart*, 20 Misc. 676, 46 N. Y. Supp. 534.

2. An order made, or a warrant issued against a judgment debtor, after the issuing and before the return of an execution.

3. An order, made after the issuing, and either before or after the return, of an execution, against a person who has property of the judgment debtor, or is indebted to him.⁹

It will be noticed that in each case the issuance of an execution is a condition precedent.

— **Order against judgment debtor before return.** Proceedings against the judgment debtor personally are proper before the return of execution only where he has property which he unjustly refuses to apply towards the satisfaction of the judgment.¹⁰ Proceedings cannot be maintained before return if the judgment debtor has property in his open and notorious possession and within reach of execution and he shows no design to remove or fraudulently dispose of it.¹¹

— **Order against third person.** Proceedings to compel an examination of a third person may be pursued either alone or simultaneously with proceedings to compel an examination of the judgment debtor.¹² Proceedings to examine the judgment debtor are not a condition precedent to proceedings to examine third persons,¹³ though the proceedings must be had under the appropriate section of the Code.¹⁴ The judgment debtor is not even entitled to notice of the proceedings unless the judge so directs.¹⁵ The order may be granted either before or after the return of execution. A third person may be examined though his debt is not yet due.¹⁶ The wife of a judgment debtor may be examined as a third person,¹⁷ as may the presi-

⁹ Code Civ. Proc. § 2432.

¹⁰ Code Civ. Proc. § 2436.

¹¹ Sackett v. Newton, 10 How. Pr. 560.

¹² Code Civ. Proc. § 2432.

¹³ Gibson v. Haggerty, 37 N. Y. 555.

¹⁴ Woodman v. Goodenough, 18 Abb. Pr. 265.

¹⁵ Pommerantz v. Bloom, 32 Misc. 754, 99 State Rep. 671, 65 N. Y. Supp. 671. See, also, post, § 2347.

¹⁶ Davis v. Jones, 8 Civ. Proc. R. (Browne) 43; Davis v. Herrig, 65 How. Pr. 290.

¹⁷ Lockwood v. Worstell, 15 Abb. Pr. 430, note.

dent or treasurer of a joint stock association,¹⁸ or a corporation; but a receiver,¹⁹ or an officer of the court having the custody of a fund in court,²⁰ or a bank holding funds belonging to a bankrupt estate as depository of the bankrupt court,²¹ cannot be examined.

§ 2328. Election of remedies.

Supplementary proceedings should not be stayed pending a creditor's suit on the judgment to reach certain real estate. The remedies are concurrent, and both may be prosecuted where no abuse is shown.²² The levy of a second execution, if not clearly sufficient to satisfy the judgment, is no objection to the continuance of supplementary proceedings under the first execution.²³ Proceedings to compel an examination of a third person may be pursued either alone or simultaneously with proceedings to compel an examination of the judgment debtor.²⁴ The issuing of an attachment is not an election of remedies which will preclude supplementary proceedings.²⁵

¹⁸ *Courtois v. Harrison*, 1 Hilt. 109, 3 Abb. Pr. 96, 12 How. Pr. 359.

¹⁹ *Fitchburgh Nat. Bank v. Bushwick Chemical Works*, 13 Civ. Proc. R. (Browne) 155. See, also, *Bucki v. Bucki*, 26 Misc. 69, 56 N. Y. Supp. 439.

²⁰ *Anon.*, Code R. (N. S.) 211.

²¹ *Havens v. National City Bank of Brooklyn*, 6 T. & C. 346, 4 Hun, 131.

²² *Gates v. Young*, 17 Wkly. Dig. 551; *In re Bachiller de Ponce de Leon*, 69 N. Y. Supp. 242.

²³ *Smith v. Davis*, 63 Hun, 100, 17 N. Y. Supp. 614; *Hanson v. Tripler*, Code R. (N. S.) 154; *Sale v. Lawson*, 6 Super. Ct. (4 Sandf.) 718; *Fellerman's Case*, 2 Abb. Pr. 155; *Lilliendahl v. Fellerman*, 11 How. Pr. 528; *Farquaharson v. Kimball*, 9 Abb. Pr. 385, note, 18 How. Pr. 33; *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99. But see *Steinhardt v. Michalda*, 15 Civ. Proc. R. (Browne) 323, which holds that levy suspends the supplementary proceedings until the return of the sheriff.

²⁴ Code Civ. Proc. § 2432.

²⁵ *Hanson v. Tripler*, 5 Super. Ct. (3 Sandf.) 733.

§ 2329. Persons entitled.

A person entitled to issue execution on a judgment, may, after an execution has been issued, institute supplementary proceedings. The term "judgment creditor," as used in the Code, signifies the person who is entitled to collect, or otherwise enforce, in his own right, a judgment for a sum of money or directing the payment of a sum of money.²⁶ This includes the assignee of the judgment,²⁷ and the personal representatives of the judgment creditor.²⁸ An assignee may institute the proceedings though the original judgment creditor be dead,²⁹ or though the assignment was after the return of the execution.³⁰ An attorney for the judgment creditor cannot institute proceedings to enforce his lien without obtaining leave of court.³¹ An agent who has received proper authority so to do may institute the proceedings.³² So an attorney employed to collect a claim has authority, under his original retainer, to institute supplementary proceedings to collect the judgment.³³

The party to whom costs are awarded "in a special proceeding," is to be deemed a judgment creditor and the party against whom they are awarded is deemed a judgment debtor in so far as the right to institute supplementary proceedings is concerned.³⁴

²⁶ Code Civ. Proc. § 3343, subd. 13.

²⁷ *Ross v. Clussman*, Code R. (N. S.) 91; *Crill v. Kornmeyer*, 56 How. Pr. 276, and cases cited; *Maigille v. Leonard*, 102 App. Div. 367.

²⁸ *Collier v. De Revere*, 7 Hun, 61; *Walker v. Donovan*, 6 Daly, 552; *Id.*, 53 How. Pr. 3; *Pardee v. Tilton*, 20 Hun, 76. But person cannot institute proceedings in his individual capacity against himself in his representative capacity. *Matter of Livingston*, 27 Hun, 607.

²⁹ *Crill v. Kornmeyer*, 56 How. Pr. 276.

³⁰ *Ross v. Clussman*, 5 Super. Ct. (3 Sandf.) 676, Code R. (N. S.) 91; *Orr's Case*, 2 Abb. Pr. 457.

³¹ *Moore v. Taylor*, 2 How. Pr. (N. S.) 343.

³² *Hawes v. Barr*, 30 Super. Ct. (7 Rob.) 452.

³³ *Ward v. Roy*, 69 N. Y. 96.

³⁴ Code Civ. Proc. § 2432, as amended in 1896.

§ 2330. Persons liable.

In the absence of statutory limitation, supplementary proceedings may be instituted against every person against whom an execution may lawfully issue, and over whom the court is not forbidden to exercise jurisdiction.³⁵ Married women,³⁶ infants,³⁷ and lunatics, may all be examined. So the proceeding is available against a trustee against whom a judgment has been recovered as trustee.³⁸ Of course, if the person is shown to be exempt from arrest or service of process, as where he is a member in attendance on the legislature,³⁹ he cannot be punished for refusal to obey the order. It seems that a receiver cannot be appointed in supplementary proceedings against a joint stock association.⁴⁰

As already stated, third persons may be proceeded against, where they are indebted to, or have property of the judgment debtor.⁴¹

— **Corporations.** Supplementary proceedings cannot be maintained against a domestic corporation or a foreign corporation, except in those actions or special proceedings brought by or against the people of the state,⁴² unless the foreign corporation has no business or fiscal agency, or agency for the transfer of its stock, in this state.⁴³ A foreign corporation doing business here cannot be examined in supplementary proceedings,⁴⁴ even after the appointment of a receiver in its

³⁵ 3 Freeman, Executions, § 398a.

³⁶ Formerly a judgment against a married woman was insufficient. *Thompson v. Sargent*, 15 Abb. Pr. 452.

³⁷ *Lederer v. Ehrenfeld*, 49 How. Pr. 403.

³⁸ *Matter of Gough*, 31 App. Div. 307, 52 N. Y. Supp. 627, 5 Ann. Cas. 194.

³⁹ *Everard v. Brennan*, 2 City Ct. R. 351.

⁴⁰ *Bruns v. Kare*, 12 Civ. Proc. R. (Browne) 86.

⁴¹ See ante, § 2327.

⁴² Code Civ. Proc. § 2463. The last clause was added by amendment in 1886.

⁴³ *Logan v. McCall Pub. Co.*, 140 N. Y. 447. Contra, *Stevens v. Page*, 4 Misc. 517, 54 State Rep. 133, 24 N. Y. Supp. 698, 23 Civ. Proc. R. (Browne) 191.

⁴⁴ *Levy v. Swick Piano Co.*, 17 Misc. 145, 39 N. Y. Supp. 409.

own state and a temporary ancillary receiver in this state.⁴⁵ This Code rule precludes proceedings for the examination of a third person as to property in his possession belonging to the judgment debtor where the latter is a corporation.⁴⁶

§ 2331. Time.

Supplementary proceedings may be instituted "at any time within ten years after the return" of an execution against property.⁴⁷ This ten years' limitation is applicable to an order to examine a third person.⁴⁸ But inasmuch as new executions may be issued from time to time the right to institute supplementary proceedings could be extended indefinitely were it not held that the ten years must be computed from the return of the first execution, subject to the right of the judgment creditor, by leave of court, to revive his judgment by a suit on the judgment and then issue a new execution on which supplementary proceedings may be maintained.⁴⁹ Supplementary proceedings based on a justice's judgment docketed with the county clerk before the expiration of six years are not barred by the six-year limitation applicable to actions on such a judgment.⁵⁰ The mere adjudication of the judgment debtor as a bankrupt, where the debt had not been proved in bankruptcy, nor a stay granted by the United States court, does not operate as a stay so as to affect the ten years' limitation, though the debt was afterward proved in bankruptcy.⁵¹

⁴⁵ *Matter of Vietor*, 20 Misc. 289, 79 State Rep. 800, 45 N. Y. Supp. 800.

⁴⁶ *Fitchburgh Nat. Bank v. Bushwick Chemical Works*, 13 Civ. Proc. R. (Browne) 155.

⁴⁷ Code Civ. Proc. § 2435; *McGuire v. Hudson*, 41 State Rep. 295, 16 N. Y. Supp. 392. Same limitation as creditors' suit. *Corning v. Stebbins*, 1 Barb. Ch. 589.

⁴⁸ *Peck v. Disken*, 41 Misc. 473, 84 N. Y. Supp. 1094.

⁴⁹ *Importers' & Traders' Nat. Bank v. Quackenbush*, 143 N. Y. 567; *Baumler v. Ackerman*, 63 Hun, 40, 43 State Rep. 87, 17 N. Y. Supp. 436. Contra, *Levy v. Kirby*, 51 Super. Ct. (19 J. & S.) 69.

⁵⁰ *Bolt v. Hauser*, 57 Hun, 567, 19 Civ. Proc. R. (Browne) 210, 33 State Rep. 343, 11 N. Y. Supp. 366, 368; *Green v. Hauser*, 18 Civ. Proc. R. (Browne) 354, 31 State Rep. 17, 9 N. Y. Supp. 660.

⁵¹ *Cleveland v. Johnson*, 5 Misc. 484, 26 N. Y. Supp. 734.

There is no express statutory limitation as to the time when a proceeding after the issue and before the return of an execution must be instituted but the Code uses the words "at any time." It would seem, however, that the ten-year statute of limitation should apply since section 414 of the Code which relates to limitation of actions provides that the word "action," as contained therein, is to be construed, when it is necessary to do so, as including a special proceeding.

§ 2332. Property which can be reached.

As a general rule every species of property, not exempt by law, may be reached in supplementary proceedings.⁵² Property which can be reached by a creditor's bill can be reached by supplementary proceedings.⁵³ Membership in a board of exchange where transferable,⁵⁴ the property in a patent right,⁵⁵ or the vested interest of a person in the funds of an organization as evidenced by a certificate of membership,⁵⁶ may be reached. Of course, only the property belonging to the judgment debtor can be reached. For instance, bonds executed by a railroad company and in the hands of its agents to be negotiated for its use, are not property of the company which can be reached by supplementary proceedings.⁵⁷ So public moneys raised by a municipal corporation by taxation, when in the hands of its fiscal officer, are not the property of the corporation or a debt due to it.⁵⁸ Property assigned prior to the

⁵² For tabulated list of what may, and what may not, be reached, see 3 Civ. Proc. R. (Browne) 249, 250.

⁵³ *Barnes v. Morgan*, 3 Hun, 703, 6 T. & C. 105.

⁵⁴ *Leggett v. Waller*, 39 Misc. 408, 80 N. Y. Supp. 13; *Ritterband v. Baggett*, 4 Abb. N. C. 67, 42 Super. Ct. (10 J. & S.) 556; *Powell v. Waldron*, 89 N. Y. 328; *Londheim v. White*, 67 How. Pr. 467; *Grocers' Bank v. Murphy*, 60 How. Pr. 426, 10 Daly, 168.

⁵⁵ *Barnes v. Morgan*, 3 Hun, 703, 6 T. & C. 105. And the court may compel the judgment debtor to execute and deliver to the receiver an assignment of such letters patent. *Clan Ranald v. Wyckoff*, 41 Super. Ct. (9 J. & S.) 527.

⁵⁶ *Dease v. Reese*, 39 Misc. 657, 80 N. Y. Supp. 590.

⁵⁷ *Cunningham v. Pennsylvania, S. & N. E. R. Co.*, 11 State Rep. 663.

⁵⁸ *Lowber v. City of New York*, 7 Abb. Pr. 248.

Art. 1. General Rules.—Property Which Can be Reached.

commencement of supplementary proceedings cannot be reached⁵⁹ unless the assignment was fraudulent,⁶⁰ though the receiver's right to sue to set aside a fraudulent conveyance is not exclusive of the right of other judgment creditors.⁶¹

There are three classes of property which cannot be reached by supplementary proceedings, viz.:

1. Property which is expressly exempt by law from levy and sale under an execution.⁶² What property is exempt from levy and sale under an execution has been treated of in the chapter on attachment.⁶³ If the debtor claims an exemption, it is doubtful whether the question of exemption can be tried in the supplementary proceedings.⁶⁴

2. Any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.⁶⁵ For instance, a fund raised for the relief of a member by the officials of a social club is not subject to supplementary proceedings, where a certain sum per week is set aside for the necessities of such member,⁶⁶ nor

⁵⁹ *Ward v. Petrie*, 157 N. Y. 301; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Charlier v. Saginaw Steel S. S. Co.*, 7 App. Div. 609, 40 N. Y. Supp. 278; *Pettibone v. Drakeford*, 37 Hun, 628; *Field v. Sands*, 21 Super. Ct. (8 Bosw.) 685; *Watrous v. Lathrop*, 6 Super. Ct. (4 Sandf.) 700.

⁶⁰ *Seymour v. Wilson*, 14 N. Y. (4 Kern.) 567; *Brown v. Gilmore*, 16 How. Pr. 527; *Ward v. Petrie*, 92 Hun, 605, 72 State Rep. 313, 36 N. Y. Supp. 940.

⁶¹ *Metcalfe v. Del Valle*, 64 Hun, 245, 46 State Rep. 105, 19 N. Y. Supp. 16.

⁶² Code Civ. Proc. § 2463; *Finnin v. Malloy*, 33 Super. Ct. (1 J. & S.) 382. Proceeds of exempt property cannot be reached. *Tillotson v. Wolcott*, 48 N. Y. 188.

⁶³ Volume 2, §§ 1087-1097, pp. 1415-1431.

⁶⁴ *Dickinson v. Onderdonk*, 18 Hun, 479.

⁶⁵ Code Civ. Proc. § 2463. See, also, *Ten Broeck v. Sloo*, 2 Abb. Pr. 234, 13 How. Pr. 28; *Campbell v. Genet*, 2 Hilt. 290; *Graff v. Bonnett*, 31 N. Y. 9; *Muller v. Hall*, 49 How. Pr. 374; *Manning v. Evans*, 19 Hun, 500; *Lawrence v. Pease*, 50 State Rep. 851, 21 N. Y. Supp. 223. The same rule applies to a creditor's suit. Code Civ. Proc. § 1879. See chapter on creditor's suits for full discussion of this subject.

⁶⁶ *Wilder v. Clark*, 33 State Rep. 143, 11 N. Y. Supp. 683.

are moneys received by the widow of a policeman from the police pension or insurance fund.⁶⁷ In short, the interest of a beneficiary in a trust fund created by a person other than the debtor cannot be reached,⁶⁸ except by a direct action by the judgment creditor,⁶⁹ and except, as already stated in a preceding chapter,⁷⁰ where judgments in particular actions may be enforced by an execution against a portion of the income.

3. The earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding, when it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family, wholly or partly supported by his labor.⁷¹ This exemption should be liberally construed in favor of the debtor.⁷² The question naturally arises as to what are "earnings" for "personal" services. Does the phrase confine the exemption to "wages" or is it extensive enough to cover all "earnings" to which the services of the debtor contribute? If the latter, does the exemption cover all the earnings of the business or merely the amount earned by the debtor? This "shot gun" expression has not been defined though oftentimes applied to particular facts. The earnings must be for "personal" services,⁷³ and earnings are to be distinguished from the proceeds of a business carried on by the debtor.⁷⁴ Thus moneys due from customers of a person engaged in retailing ice, in which business he employs two ice carts and several men,⁷⁵ or moneys received by a saloonkeeper in the conduct of his business,⁷⁶ are not "personal earnings." So the exemp-

⁶⁷ *Sargent v. Bennett*, 3 How. Pr. (N. S.) 515.

⁶⁸ *Matter of Seymour*, 76 App. Div. 300, 79 N. Y. Supp. 122.

⁶⁹ *Scott v. Nevius*, 13 Super. Ct. (6 Duer) 672; *McEwen v. Brewster*, 17 Hun, 223; *Levey v. Bull*, 47 Hun, 350, 14 State Rep. 596, 28 Wkly. Dig. 108. See post, § 2454.

⁷⁰ See ante, § 2231.

⁷¹ Code Civ. Proc. § 2463. See, also, vol. 2, p. 1422, note 300.

⁷² *Miller v. Hooper*, 19 Hun, 394, 396.

⁷³, ⁷⁴ *Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546.

⁷⁵ *Mulford v. Gibbs*, 9 App. Div. 490, 41 N. Y. Supp. 273.

⁷⁶ *Prince v. Brett*, 21 App. Div. 190, 47 N. Y. Supp. 402.

Art. I. General Rules.—Property Which Can be Reached.

tion does not extend to one who buys and sells merchandise.⁷⁷ In opposition to these cases it has been held that the exemption covers the earnings of a photographer who does nearly all his work.⁷⁸ In the latter case it is held that this exemption does not apply exclusively to earnings derived from personal services to others in a subordinate or inferior capacity but includes earnings derived from a business where the services are the chief factor in it. It has also been held that the net proceeds of a business carried on by a judgment debtor with the assistance of others are his personal earnings.⁷⁹ Such earnings include tuition fees payable quarterly in advance.⁸⁰ But sums due for board are not personal earnings.⁸¹ The earnings are not necessary "for the use of a family, supported wholly or partly by his labor," where the judgment debtor was unmarried, a boarding house keeper, and merely hired a woman and gave her, for her services, her board and that of her two children, and clothed them in part.⁸² And if the debtor in no way contributes to the support of his house or family, his earnings are not exempt.⁸³ Formerly it was held that the sixty days ran back from the order for the application of the debtor's property and not from the original order for his examination,⁸⁴ but now the time runs from the date of the order for examination, whether the order is to examine the judgment debtor or a third person.⁸⁵ The court cannot, in such proceedings, direct the payment of earnings not due and payable when the order of examination was made.⁸⁶ Thus, it has been

⁷⁷ *Mulford v. Gibbs*, 9 App. Div. 490, 41 N. Y. Supp. 273.

⁷⁸ *McSkiman v. Knowlton*, 20 Civ. Proc. R. (Browne) 274, 14 N. Y. Supp. 283.

⁷⁹ *Sandford v. Goodwin*, 20 Civ. Proc. R. (Browne) 276, note.

⁸⁰ *Miller v. Hooper*, 19 Hun, 394.

⁸¹ *Whalen v. Tennison*, 1 Month. Law Bul. 21.

⁸² *Van Vechten v. Hall*, 14 How. Pr. 436.

⁸³ *Martin v. Sheridan*, 2 Hilt. 586.

⁸⁴ *Bush v. White*, 12 Abb. Pr. 21.

⁸⁵ *Matter of Trustees of Board of Pub. and Sabbath School Work*, 22 Misc. 645, 50 N. Y. Supp. 171.

⁸⁶ *Kroner v. Reilly*, 49 App. Div. 41, 63 N. Y. Supp. 527; *Matter of Trustees of Board of Pub. & Sabbath School Work*, 22 Misc. 645, 50 N. Y.

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held that under an order granted on a certain day a salary that does not become payable until the close of the day cannot be reached.⁸⁷ If it is doubtful whether the money was earned before or after the order, the debtor is entitled to the benefit of the doubt.⁸⁸ The judge has no authority to make an order directing the debtor to set apart a portion of his salary each month as it becomes due and apply it to the judgment until it is paid,⁸⁹ except, as set forth in a preceding chapter,⁹⁰ that ten per cent of such earnings can be reached on an execution on a judgment wholly for necessities sold or work performed in a family as a domestic or for services rendered for salary owing to an employe of the judgment debtor. The salary of a judicial or other public officer, while in the hands of the disbursing officer of the general or municipal government, cannot be reached.⁹¹ The exemption of money as earned within sixty days must be made to appear affirmatively,⁹² and it must appear, "by the debtor's oath or otherwise," that such earnings are necessary for the use of a family wholly or partly supported by his labor.⁹³

Where the execution was issued on a judgment against defendants jointly indebted, where all are not served, or on a judgment in an action against the defendants not summoned in the original action, a debt due to, or other personal property owned by, one or more of the defendants not summoned, jointly with the defendants summoned, or with any of them, may be reached by supplementary proceedings on the judgment.⁹⁴

Supp. 171; Albright v. Kempton, 4 Civ. Proc. R. (Browne) 16; Woodman v. Goodenough, 18 Abb. Pr. 265; Campbell v. Foster, 16 How. Pr. 275.

⁸⁷ First Nat. Bank of Auburn v. Beardsley, 8 Wkly. Dig. 7.

⁸⁸ Potter v. Low, 16 How. Pr. 549.

⁸⁹ Columbian Inst. v. Cregan, 11 Civ. Proc. R. (Browne) 87, 3 State Rep. 287.

⁹⁰ See ante, § 2231.

⁹¹ Waldman v. O'Donnell, 57 How. Pr. 215; Remmey v. Gedney, 1 City Ct. R. 28, 57 How. Pr. 217, note; Gray v. Ashley, 24 Misc. 396, 53 N. Y. Supp. 547; People ex rel. Blair v. Grout, 45 Misc. 505, 508.

⁹² Matter of Van Ness, 21 Misc. 249, 47 N. Y. Supp. 702.

⁹³ Code Civ. Proc. § 2463.

⁹⁴ Code Civ. Proc. § 2461.

§ 2333. Successive examinations.

A second order for examination should not be made unless the creditor can show facts arising after one examination that call for a further examination,⁹⁵ such as that the judgment debtor has acquired property since his former examination.⁹⁶ The same rule applies to an examination on a judgment recovered in an action on another judgment under which latter judgment supplementary proceedings had been instituted,⁹⁷ or to a second examination under another judgment between the same parties.⁹⁸ The judge has no jurisdiction to grant the second order unless the affidavit alleges sufficient reasons therefor; but if sufficient facts are alleged to give the judge jurisdiction then it rests in his sound discretion whether a further or second examination will be ordered.⁹⁹

But if supplementary proceedings were discontinued or dismissed without an examination, a second order may be based on the same facts. Thus, a default made by plaintiff in conducting supplementary proceedings does not preclude plaintiff from again seeking the same remedy on the same facts,¹⁰⁰ nor does the fact that the proceedings were terminated by consent, though no order of discontinuance was entered.¹⁰¹ So the vacating the order for an examination does not preclude a subsequent order based on the same facts.¹⁰² However, a second order for examination, issued by a different judge, is

⁹⁵ *Irwin v. Chambers*, 40 Super. Ct. (8 J. & S.) 432.

⁹⁶ *Sellig v. McIntyre*, N. Y. Daily Reg., July 28, 1883; *Marshall v. Ling*, 36 State Rep. 60, 20 Civ. Proc. R. (Browne) 109, 13 N. Y. Supp. 224.

⁹⁷ *Irwin v. Chambers*, 40 Super. Ct. (8 J. & S.) 432.

⁹⁸ *Canavan v. McAndrew*, 20 Hun, 46.

⁹⁹ *Schermerhorn v. Owens*, 29 Misc. 674, 62 N. Y. Supp. 763; *Marshall v. Link*, 36 State Rep. 60, 20 Civ. Proc. R. (Browne) 109, 13 N. Y. Supp. 224.

¹⁰⁰ *Weiss v. Ashman*, 11 Misc. 377, 65 State Rep. 290, 24 Civ. Proc. R. (Scott) 268, 1 Ann. Cas. 314, 32 N. Y. Supp. 161.

¹⁰¹ *Carter v. Clarke*, 30 Super. Ct. (7 Rob.) 43.

¹⁰² *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. (N. S.) 517.

irregular where the first order has not been revoked or discharged.¹⁰³

§ 2334. Stay of proceedings.

An appeal from the judgment, unaccompanied by an undertaking, does not stay proceedings.¹⁰⁴ And if there is a stay by the giving of an undertaking it merely "suspends" the proceedings.¹⁰⁵ The proceedings should not be stayed pending a creditor's suit.¹⁰⁶ But the proceedings may be stayed to enable a party to make a motion in the action relating to the judgment or execution. So a person adjudged a bankrupt may move to stay proceedings against him.¹⁰⁷ Another judge at chambers cannot stay the proceedings.¹⁰⁸

§ 2335. Review of orders.

Section 2433 of the Code fixes the mode of reviewing "an order made in the course" of supplementary proceedings. It applies not only to an order for examination but also to any other order made in the course of the proceeding. It provides that such an order "can be reviewed only as follows:

1. An order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action; or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued.

2. Where the execution was issued out of a county court, an appeal from an order, made in the course of the proceedings, may be taken in like manner, as if the order was made in an action brought in the same court."¹⁰⁹

¹⁰³ *Allen v. Starring*, 26 How. Pr. 57.

¹⁰⁴ *Conway v. Hitchins*, 9 Barb. 378.

¹⁰⁵ See post, p. 3268, last paragraph.

¹⁰⁶ *Gates v. Young*, 17 Wkly. Dig. 551.

¹⁰⁷ *World Co. v. Brooks*, 7 Abb. Pr. (N. S.) 212.

¹⁰⁸ *Bank of Genesee v. Spencer*, 15 How. Pr. 14.

¹⁰⁹ Code Civ. Proc. § 2433. Subd. 2, see *Billington v. Billington*, 16 Civ. Proc. R. (Browne) 56, 4 N. Y. Supp. 504; *Robens v. Sweet*, 48 Hun, 436, 1 N. Y. Supp. 839.

If execution was not issued out of a county court, an appeal does not lie from an order in supplementary proceedings made by a judge out of court, but if a review of it is desired a motion to vacate should be made and the appeal taken from the order denying the motion.¹¹⁰ Such an order made in the course of supplementary proceedings is reviewable in the first instance only by the judge who made it or by the court out of which the execution was issued, on a motion to vacate or modify the order;¹¹¹ but an order made by a "court" on such a motion may be reviewed by appeal to the appellate division.¹¹² If otherwise appealable, it is immaterial that the order was not final.¹¹³ This Code provision has no application to an order made in proceedings to punish a witness for contempt, since it is limited to orders which only affect parties to the pending proceedings.¹¹⁴

An order of a county judge for a sale of a cause of action by the receiver affects a substantial right so as to be appealable,¹¹⁵ but an order requiring the debtor to answer a certain question as to the name of a person does not affect a substantial right so as to be appealable.¹¹⁶ An order appointing a new receiver is discretionary so as not to be reviewable in the court of appeals.¹¹⁷

Merely perfecting an appeal without obtaining a stay of proceedings does not preclude the going on with the supplementary proceedings,¹¹⁸ and where a stay of proceedings is granted on an appeal from the judgment, it merely "sus-

¹¹⁰ *Palen v. Bushnell*, 68 Hun. 554, 22 N. Y. Supp. 1044; *Matter of Van Ness*, 17 App. Div. 581, 45 N. Y. Supp. 576.

¹¹¹ *Finck v. Mannering*, 46 Hun. 323.

¹¹² *Finck v. Mannering*, 46 Hun. 323; *Hart v. Johnson*, 43 Hun. 505; *Levy v. Swick Piano Co.*, 17 Misc. 145, 39 N. Y. Supp. 409.

¹¹³ *Hart v. Johnson*, 43 Hun. 505.

¹¹⁴ An appeal from such an order direct to appellate division is proper. *People v. Warner*, 51 Hun. 53, 3 N. Y. Supp. 768.

¹¹⁵ *Matter of Patterson*, 12 App. Div. 123, 42 N. Y. Supp. 495.

¹¹⁶ *Milliken v. Thomson*, 12 Civ. Proc. R. (Browne) 168. See, also, *Carter v. Clarke*, 30 Super. Ct. (7 Rob.) 490.

¹¹⁷ *Connolly v. Kretz*, 78 N. Y. 620.

¹¹⁸ *Arnoux v. Homans*, 32 How. Pr. 382.

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pendents" the proceedings and does not authorize their dismissal.¹¹⁹

§ 2336. Collateral attack.

Supplementary proceedings are entitled to all the presumptions of regularity which belong to the proceedings of courts of general jurisdiction, and the facts conferring jurisdiction of the subject-matter need not be affirmatively proven whenever questioned in a collateral proceeding.¹²⁰

ART. II. BEFORE WHAT JUDGE PROCEEDINGS HAD.

§ 2337. Judge out of court.

The proceedings must be had before a judge out of the court and not before the court.¹²¹ The authority to entertain supplementary proceedings is vested in the judges as separate judicial officers and not in the court.

§ 2338. Code provision.

The Code provides that supplementary proceedings, whether against the judgment debtor or a third person, may be instituted before either of the following judges:

1. A judge of the court out of which the execution was issued. This embraces every court of record authorized to enforce its judgments by execution against property.¹²² A judge of the city court of New York City may entertain supplementary proceedings based on a judgment rendered in that court, and may appoint a referee.¹²³ The phrase "judge of the court"

¹¹⁹ *Woolf v. Jacobs*, 36 Super. Ct. (4 J. & S.) 408; following *Cowdrey v. Carpenter*, 17 Abb. Pr. 107.

¹²⁰ *Wright v. Nostrand*, 94 N. Y. 31.

¹²¹ *Bitting v. Vandenburg*, 17 How. Pr. 80; *Douglass v. Mainzer* 40 Hun, 75.

¹²² *Baldwin v. Perry*, 25 Hun, 72, 1 Civ. Proc. R. (McCarty) 118, 61 How. Pr. 289.

¹²³ *People v. Levy*, 16 Misc. 615, 25 Civ. Proc. R. (Scott) 390, 40 N. Y. Supp. 743. Compare *Holbrook v. Orgler*, 49 How. Pr. 289, as to effect of filing of transcript.

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refers equally well to justice or judge.¹²⁴ Any justice of the supreme court may make an order, on a judgment of the supreme court, for examination, without regard to the residence or location of the justice,¹²⁵ except that he cannot compel the judgment debtor to attend in a county other than the one where the debtor resides or has a place of business.¹²⁶

2. A county judge, special county judge, or special surrogate, of the county to which the execution was issued. To enable a county judge to order the examination in a case in the supreme court, execution must be issued in his county.¹²⁷ A county judge cannot make an order for examination while an order, based on the same judgment, made by a justice of the supreme court, is still in force.¹²⁸

3. Where execution was issued to the city and county of New York, from a court other than the city court of that city, a justice of the supreme court for that city and county has jurisdiction.

4. Where the execution was issued out of a court other than the supreme court, and it is shown by affidavit that each of the judges before whom the special proceeding might be instituted, as prescribed herein, is absent from the county, or for any reason unable or disqualified to act, the special proceedings may be instituted before a justice of the supreme court.

5. Where the judgment upon which the execution was issued was recovered in a district court of the city of New York, the proceedings shall be instituted before a justice of the city court of the city of New York.¹²⁹

§ 2339. Continuance.

Section 26 of the Code which authorizes the continuance be-

¹²⁴ *Baldwin v. Perry*, 25 Hun, 72.

¹²⁵ *Bingham v. Disbrow*, 14 Abb. Pr. 251, 37 Barb. 24; *Jacobson v. Doty Plaster Mfg. Co.*, 32 Hun, 436.

¹²⁶ *Jurgenson v. Hamilton*, 5 Abb. N. C. 149; *Schenck v. Erwin*, 63 Hun, 104, 43 State Rep. 862, 17 N. Y. Supp. 616.

¹²⁷ *Terry v. Hultz*, 8 Abb. Pr. (N. S.) 109, 39 How. Pr. 169.

¹²⁸ *Allen v. Starring*, 26 How. Pr. 57.

¹²⁹ Code Civ. Proc. § 2434.

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fore one or more other judges of the same court, of special proceedings instituted before a judge of a court of record in the city and county of New York, and in the county of Kings, is made applicable to supplementary proceedings.¹³⁰

In a preceding volume,¹³¹ the Code provision¹³² has been set forth as to the continuance of supplementary proceedings in case of the death, sickness, resignation, removal from office, etc., of the officer before whom the special proceeding has been instituted, and this section of the Code is also expressly made applicable to supplementary proceedings.¹³³

The judge before whom supplementary proceedings are so continued is deemed to be the judge to whom the order or warrant is returnable, in so far as subsequent proceedings are concerned.¹³⁴

**ART. III. JUDGMENTS OR ORDERS ON WHICH PROCEEDINGS
MAY BE BASED.**

§ 2340. General rule.

Any judgment or order which may be enforced, as of course, by an execution which will bind all of the debtor's property, may be the basis of supplementary proceedings.¹³⁵ But it seems that where, from the nature of the judgment, leave to issue execution must be obtained, supplementary proceedings cannot be instituted. Thus, supplementary proceedings cannot be based on a judgment recovered against executors although execution thereon has been issued by leave of the surrogate.¹³⁶ Supplementary proceedings may be based on a surrogate's decree.¹³⁷

¹³⁰ Made applicable to supplementary proceedings by section 2462 of the Code.

¹³¹ Volume 1, p. 226.

¹³² Code Civ. Proc. § 52.

^{133, 134} Code Civ. Proc. § 2462.

¹³⁵ See *People v. Cowan*, 146 N. Y. 348.

¹³⁶ *Collins v. Beebe*, 54 Hun, 318, 27 State Rep. 4, 7 N. Y. Supp. 442.

¹³⁷ Code Civ. Proc. § 2554.

§ 2341. Judgment.

It being held that the judgment must be one which may be enforced by execution, it follows that supplementary proceedings are not authorized on a judgment in rem.¹³⁸ A judgment for costs only is sufficient to sustain the proceedings,¹³⁹ though the rule was otherwise prior to the Code amendment of 1881 which omitted the words "exclusive of costs." Section 2432 of the Code was amended in 1896 by adding the provision that "the party to whom costs are awarded in a special proceeding shall be entitled to the same remedies under this title, under the same circumstances, as near as may be, as a judgment creditor. And for the purposes of this title the party to whom such costs are awarded shall be deemed a judgment creditor, and the party against whom they are awarded shall be deemed a judgment debtor." A judgment against joint debtors, recovered on service on one, or a judgment in an action to charge defendants not personally summoned in the original action, may be enforced by supplementary proceedings.¹⁴⁰

Of course, if the judgment is extinguished by payment,¹⁴¹ or a discharge in bankruptcy,¹⁴² there is no longer any judgment left to support the proceedings, and they must fall. So supplementary proceedings cannot be maintained on an execution issued after the judgment has ceased to be a lien on the real property of the debtor;¹⁴³ though the defect may be waived

¹³⁸ *Bartlett v. McNiel*, 49 How. Pr. 55, 5 T. & C. 675.

¹³⁹ *Davis v. Herrig*, 65 How. Pr. 290; *Matter of Sirrett*, 25 Misc. 89, 54 N. Y. Supp. 666; *Burke v. Burke*, 27 Misc. 684, 58 N. Y. Supp. 676.

¹⁴⁰ Code Civ. Proc. § 2461; *Jones v. Lawlin*, 3 Super. Ct. (1 Sandf.) 722, 1 Code R. 94; *Emery v. Emery*, 9 How. Pr. 130.

¹⁴¹ Partial payment (*Williams v. Freeman*, 12 Civ. Proc. R. [Browne] 334), such as payment of the principal but not the interest (*Johnson v. Tuttle*, 17 Abb. Pr. 315), does not, however, preclude the maintenance of the proceedings.

¹⁴² *Smith v. Paul*, 20 How. Pr. 97; *Leo v. Joseph*, 56 Hun, 644, 9 N. Y. Supp. 612.

¹⁴³ *Importers' & Traders' Nat. Bank v. Quackenbush*, 143 N. Y. 567; followed in *Glover v. Gargan*, 10 App. Div. 527, 76 State Rep. 74, 42 N. Y. Supp. 74.

by the debtor by submitting, without objection, to an examination and to the appointment of a receiver.¹⁴⁴ So where the transcript of a judgment of a justice is not filed until after an action thereon is barred by limitations, an execution issued out of the county court will not support the proceedings.¹⁴⁵

— **Judgment rendered on appearance or personal service.**

A judgment will not support supplementary proceedings unless the judgment was rendered on the judgment debtor's appearance, or on personal service of the summons on him, or on substituted service of the summons as provided for in section 436 of the Code.¹⁴⁶ This requirement is jurisdictional,¹⁴⁷ but is, of course, inapplicable where the judgment on which the proceedings are founded is against the plaintiff in the original action.¹⁴⁸ It was held in 1896 that substituted service does not suffice,¹⁴⁹ but in 1897 the Code was amended so as to make such service sufficient. The word "appearance" as used in this section means a voluntary submission to the jurisdiction in whatever form manifested, and not the mere narrow and technical meaning indicated in section 421 of the Code.¹⁵⁰ Thus, supplementary proceedings may be based on a summary judgment entered on a forfeited recognizance in New York city, though there is no actual appearance.¹⁵¹

— **Amount.** The judgment must be for a sum not less than twenty-five dollars.¹⁵² Under the old Code the provision in re-

¹⁴⁴ *Glover v. Gargan*, 10 App. Div. 527, 42 N. Y. Supp. 74.

¹⁴⁵ *Davidson v. Horn*, 47 Hun, 51. *Contra*, *Rose v. Henry*, 37 Hun, 397.

¹⁴⁶ Code Civ. Proc. § 2458. Personal service is not necessary where there has been an appearance. *Diossy v. West*, 8 Daly, 298.

¹⁴⁷ *Hildreth v. Seebach*, 18 Misc. 387, 41 N. Y. Supp. 653.

¹⁴⁸ *Bean v. Tonnele*, 1 Civ. Proc. R. (McCarty) 33; *Davis v. Jones*, 8 Civ. Proc. R. (Browne) 43.

¹⁴⁹ *Hildreth v. Seebach*, 18 Misc. 387, 75 State Rep. 1040, 41 N. Y. Supp. 653.

¹⁵⁰, ¹⁵¹ *People v. Cowan*, 146 N. Y. 348.

¹⁵² Code Civ. Proc. § 2458. Prior to 1881, a judgment for \$25 or more, "exclusive of costs," was required, and this rule is held to still exist where a transcript of a judgment of a lower clerk is filed in the county clerk's office. So held as to judgment of municipal court

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lation to the amount of the judgment was limited to cases where the judgment was recovered in a justice's court and a transcript filed with the county clerk.

— **Justice of the peace judgment.** Supplementary proceedings may be maintained on a justice's judgment which has been docketed so as to become a judgment of the county court.¹⁵³

— **Judgment of United States court.** Supplementary proceedings may be instituted on a federal judgment, rendered by a court sitting in this state, on an order of a federal judge.¹⁵⁴ But a federal judgment, though docketed with the county clerk, does not authorize supplementary proceedings in a state court.¹⁵⁵

— **Judgment of appellate court.** A judgment of the appellate division reversing a judgment of the county court which affirmed a justice's judgment may be filed in the office of the county clerk so as to become the basis of supplementary proceedings in the county court.¹⁵⁶

§ 2342. Order.

No reason is apparent why an order for the payment of money, where enforceable by execution, cannot be the basis of supplementary proceedings.¹⁵⁷ It has been held that supplementary proceedings may be based on an order directing payment by the purchaser at a judicial sale of the damage resulting from the refusal of such purchaser to complete his purchase.¹⁵⁸ So an order for motion costs may be enforced by supplementary proceedings.¹⁵⁹

of Rochester (Mason v. Hackett, 35 Hun, 238) or Syracuse. Andrews v. Mastin, 22 Misc. 263, 49 N. Y. Supp. 1118.

¹⁵³ Conway v. Hitchins, 9 Barb. 378. See, also, Candee v. Gundelsheimer, 8 Abb. Pr. 435, 17 How. Pr. 434. Transcript and docket **must** correspond as to names. Simpkins v. Page, 1 Code R. 107.

¹⁵⁴ Ex parte Body, 105 U. S. 647.

¹⁵⁵ Tompkins v. Purcell, 12 Hun, 662.

¹⁵⁶ Short v. Scutt, 91 State Rep. 393, 57 N. Y. Supp. 393.

¹⁵⁷ See Weber v. Weber, 93 App. Div. 149, 87 N. Y. Supp. 519.

¹⁵⁸ Lydecker v. Smith, 44 Hun, 454, 9 State Rep. 50.

¹⁵⁹ Matter of Sirrett, 25 Misc. 89, 54 N. Y. Supp. 666.

ART. IV. ISSUANCE AND RETURN OF EXECUTION.

§ 2343. Condition precedent.

The issuance of an execution is a condition precedent to supplementary proceedings, although it is not always necessary that the execution be returned before supplementary proceedings are instituted. The Code has provided for three distinct remedies, each of which is spoken of as a supplementary proceeding. The first two consist of an order or warrant against the judgment debtor while the third is an order against a person who has property of, or is indebted to, the judgment debtor. But in each case, an execution must be "issued"¹⁶⁰ against a judgment debtor though it need not be "returned" unless the order or warrant is against the judgment debtor, in pursuance of subdivision one of section 2432 (the first remedy) of the Code. The execution must be issued out of a court of record and the Code provides as to what county the execution must be issued to.

§ 2344. Sufficiency and validity of execution.

A void execution will not support the proceedings but a voidable execution is sufficient unless set aside on a direct motion. The execution must have been properly issued out of a court of record. Thus, the proceedings cannot be based on an execution issued fifteen years before and a recent execution issued without leave of court,¹⁶¹ but, it would seem, an order in supplementary proceedings will not be vacated merely because the execution was not issued within five years and no leave was afterwards given.¹⁶² So failure to have an execution subscribed does not deprive the court of jurisdiction to entertain the pro-

¹⁶⁰ An execution is "issued" when it is placed in the hands of a proper officer to be executed.

¹⁶¹ *Belknap v. Hasbrouck*, 13 Abb. Pr. 418, note.

¹⁶² *United States Land & Emig. Co. v. Pike*, 2 Month. Law. Bul. 31; *Lynch v. Tomlinson* N. Y. Daily Reg., Oct. 30, 1883. See, also, *Union Bank of Troy v. Sargeant*, 53 Barb. 422, 35 How. Pr. 87. Contra, *Aultman & Taylor Co. v. Syme*, 87 Hun, 295, 68 State Rep. 311, 34 N. Y. Supp. 379; but see *Id.*, 163 N. Y. 54, 65.

ceedings.¹⁶³ But an execution against property in the hands of a trustee which does not substantially require a sheriff to satisfy the judgment out of that property, as required by section 1371 of the Code, is not sufficient on which to base the proceedings.¹⁶⁴ And supplementary proceedings on a justice's judgment recovered in another county must be based on an execution issued by the county clerk and not out of the county court.¹⁶⁵

§ 2345. **County to which execution must be issued.**

Supplementary proceedings cannot be instituted until an execution has been issued out of a court of record: and, either,

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceeding, a place for the regular transaction of business in person; or,

2. If the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or,

3. If he is not then a resident of the state, to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.¹⁶⁶

It will be observed that under subdivision one the residence of the debtor is immaterial while subdivision two applies only where the debtor is a resident of the state and subdivision three applies only where the debtor is a nonresident. Furthermore, the provisions are in the alternative. Thus, if the debtor is a resident the execution may be issued either to his residence "or" his place of business.

— **County where debtor has place of business.** The execution may be issued to the county in which the debtor has "a

¹⁶³ Bareither v. Brosche, 13 N. Y. Supp. 561, 19 Civ. Proc. R. (Browne) 446.

¹⁶⁴ Felt v. Dorr, 29 Hun, 14.

¹⁶⁵ Merritt v. Judd, 18 Civ. Proc. R. (Browne) 159, 9 N. Y. Supp. 491.

¹⁶⁶ Code Civ. Proc. § 2458.

place for the regular transaction of business in person."¹⁶⁷ The place of business need not be the debtor's principal place of business,¹⁶⁸ but must be a regular place of business where the judgment debtor transacts business in person.¹⁶⁹ A school teacher, residing in another county, but teaching in the public schools in the city of New York, has a place of business therein.¹⁷⁰ So an agent has a place of business where he has desk room;¹⁷¹ though it has been held that a weigher attached to a custom house has not a place of business merely because he has desk room, where he receives orders and communications, where his general duties are performed on the docks.¹⁷²

— **County of residence.** It is sufficient, if the judgment debtor is a resident of the state at the time of the commencement of the proceedings, that an execution be issued to the sheriff of the county where he resides.¹⁷³ This county of residence to which an execution is issued is not necessarily his domicile or his permanent residence but may be a mere temporary residence such as a summer residence.¹⁷⁴ So hired lodgings, occupied from time to time, constitute a residence.¹⁷⁵

§ 2346. Return of execution.

It is only when the creditor seeks an order for the examination, or a warrant of arrest, of the judgment debtor himself, under subdivision one of section 2432 of the Code, that a return of the execution wholly or partly unsatisfied is a condition precedent to the granting of the order or warrant. In

¹⁶⁷ Prior to 1881, the words "an office" were used instead of "a place."

¹⁶⁸ *McEwan v. Burgess*, 15 Abb. Pr. 473, 25 How. Pr. 92.

¹⁶⁹ *Brown v. Gump*, 59 How. Pr. 507.

¹⁷⁰ *Burke v. Burke*, 27 Misc. 684, 58 N. Y. Supp. 676.

¹⁷¹ *Batchelder v. Nugent*, 24 N. Y. Supp. 828, 23 Civ. Proc. R. (Browne) 178.

¹⁷² *Belknap v. Hasbrouck*, 13 Abb. Pr. 418, note.

¹⁷³ See *Bingham v. Disbrow*, 14 Abb. Pr. 251, 37 Barb. 24; *Jesup v. Jones*, 32 How. Pr. 191; *Franey v. Smith*, 88 Hun. 215, 68 State Rep. 714, 34 N. Y. Supp. 780.

¹⁷⁴ *Matter of Rowland*, 21 App. Div. 172, 47 N. Y. Supp. 493.

¹⁷⁵ *Rose v. Durant*, 87 App. Div. 240, 84 N. Y. Supp. 276.

other words, a creditor cannot proceed under the subdivision until he has exhausted his remedy at law. And where the execution has not been returned unsatisfied in whole or in part, before proceeding under this subdivision, there is no jurisdiction and hence no waiver by an appearance and submission to an examination.¹⁷⁶ But the fact that the return was not filed until two hours after the order for examination was made may be disregarded or cured by amendment.¹⁷⁷

— **When remedy by execution is exhausted.** Inasmuch as an exhaustion of the remedy by execution is a condition precedent to an order for examination under subdivision one, it becomes necessary to consider what is a sufficient return partly unsatisfied or *nulla bona* to be a basis for this proceeding. A return of an execution unsatisfied is sufficient though there is a second outstanding execution which has not been returned.¹⁷⁸ It is immaterial that a return was made before the expiration of sixty days,¹⁷⁹ though pursuant to a request by the judgment creditor's attorney, where it was apparent that no property could be found.¹⁸⁰ But the rule is otherwise where there is no real attempt to effect a levy and the premature return is the result of the judgment creditor's fraud or collusion with the sheriff.¹⁸¹ If the execution is returned only partly satisfied or *nulla bona*, the debtor or a third person cannot go behind the return to show the existence of property subject to execution, except by a direct motion in the action to set the return aside.¹⁸²

¹⁷⁶ *Jennings v. Lancaster*, 15 Misc. 444, 72 State Rep. 667, 37 N. Y. Supp. 196.

¹⁷⁷ *Jones v. Porter*, 6 How. Pr. 286.

¹⁷⁸ *Owen v. Dupignac*, 9 Abb. Pr. 180, 17 How. Pr. 512.

¹⁷⁹ *High Rock Knitting Co. v. Bronner*, 18 Misc. 631, 77 State Rep. 684, 43 N. Y. Supp. 684.

¹⁸⁰ *Hart v. Stearns*, 4 Wkly. Dig. 540; *Sperling v. Levy*, 10 Abb. Pr. 426, 1 Daly, 95.

¹⁸¹ *Ritterband v. Maryatt*, 12 N. Y. Leg. Obs. 158; *Pudney v. Griffiths*, 6 Abb. Pr. 211, 15 How. Pr. 410; *Nagle v. James*, 7 Abb. Pr. 234; *Spencer v. Cuyler*, 17 How. Pr. 157, 9 Abb. Pr. 382.

¹⁸² *Fenton v. Flag*, 24 How. Pr. 499; *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. (N. S.) 517; *Stoors v. Kelsey*, 2 Paige, 418. However, a return *nulla bona* is not conclusive on the judge when the

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The application cannot be defeated by an affidavit by the judgment debtor that he has real estate subject to levy on execution, where the execution has been returned unsatisfied and there is no showing of fraud or collusion between the judgment creditor and the sheriff.¹⁸³ In an action against persons jointly liable on contract, where summons is served on only a part, an execution issued against the joint property of all the defendants, and returned unsatisfied, is a sufficient exhaustion of the remedy at law.¹⁸⁴

ART. V. PROCEDURE TO PROCURE ORDER FOR EXAMINATION.

§ 2347. Notice of proceedings.

Supplementary proceedings are usually instituted without notice. Notice is not necessary though the better practice is to give notice.¹⁸⁵ The order for a second examination may be granted *ex parte*.¹⁸⁶ The judge may require such notice as he deems just, or the order may be granted and the proceedings conducted without notice, to the judgment debtor, where a third person order is sought.¹⁸⁷

§ 2348. General rules as to affidavits.

Whether the proceeding is to examine the judgment debtor after the return of the execution, or before the return, or to examine a third person either before or after a return, there are certain rules applicable to the affidavit which apply without regard to the nature of the proceeding, and these will now be stated.

record shows it to be false. *Moyer v. Moyer*, 7 App. Div. 523, 40 N. Y. Supp. 258.

¹⁸³ *Eleventh Ward Bank v. Heather*, 22 Misc. 87, 48 N. Y. Supp. 449, 5 Ann. Cas. 80. Showing of fraud or collusion is a good defense. *Spencer v. Cuyler*, 17 How. Pr. 157.

¹⁸⁴ *Perkins v. Kendall*, 3 Civ. Proc. R. (Browne) 240; *Produce Bank v. Morton*, 67 N. Y. 199.

¹⁸⁵ *Todd v. Crooke*, 6 Super. Ct. (4 Sandf.) 694; *Hulsaver v. Wiles*, 11 How. Pr. 446, 449.

¹⁸⁶ *Goodall v. Demarest*, 2 Hilt. 534.

¹⁸⁷ See post, § 2355.

— **Necessity.** Under the old Code it was held that an affidavit was not necessary,¹⁸⁸ but under the present Code an “affidavit or other competent written evidence” is necessary.¹⁸⁹

— **Who may make.** The affidavit may be made by the owner of the judgment, or his attorney, or his agent in charge of the collection of the judgment,¹⁹⁰ but if the affidavit is made by one other than the original judgment creditor, it should show his right to proceed on the judgment.¹⁹¹

— **Title.** The affidavit is not entitled as in an action but as in a special proceeding. A defective title is not fatal.¹⁹² Thus, error in entitling the papers “in justice’s court,” where a transcript of the judgment is filed with the county clerk, does not render the proceedings void.¹⁹³

— **Information and belief.** The general rule applicable to all affidavits that if the facts are stated on information and belief the sources of information or the grounds of belief must be stated,¹⁹⁴ applies.¹⁹⁵ And an attorney should not make the affidavit on information furnished by his client.¹⁹⁶

— **Showing authority of deponent.** As already stated, the affidavit, if made by one other than the original judgment creditor, must show that the person making the affidavit is authorized so to do.¹⁹⁷ If made by an assignee of the judgment, it should show the assignment.¹⁹⁸ If made by a personal repre-

¹⁸⁸ *Scott v. Durfee*, 59 Barb. 390, note; *Collier v. De Revere*, 7 Hun. 61.

¹⁸⁹ Code Civ. Proc. §§ 2435, 2436, 2441.

¹⁹⁰ *Conway v. Hitchins*, 9 Barb. 378, 383. See, also, *Brown v. Walker*, 28 State Rep. 36, 8 N. Y. Supp. 59.

¹⁹¹ So held where affidavit was made by assignee of judgment. *Frederick v. Decker*, 18 How. Pr. 96.

¹⁹² *Lynch v. Riley*, 22 Wkly. Dig. 357; *People v. Oliver*, 66 Barb. 570. General rules as to title of affidavits, see vol. 1, p. 536.

¹⁹³ *People v. Oliver*, 66 Barb. 570.

¹⁹⁴ Volume 1, p. 541.

¹⁹⁵ *Manken v. Pape*, 65 How. Pr. 453. See, also, post, §§ 2349, 2363, 2370.

¹⁹⁶ *Klinke v. Levey*, N. Y. Daily Reg., Aug. 22, 1883.

¹⁹⁷ *Brown v. Walker*, 28 State Rep. 36, 8 N. Y. Supp. 59.

¹⁹⁸ *Lindsay v. Sherman*, 5 How. Pr. 308, Code R. (N. S.) 25. Compare *Hough v. Kohlin*, Code R. (N. S.) 232.

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sentative of the judgment creditor, it should show the death, the appointment, etc. If made by an agent, it should state the nature of his agency,¹⁹⁹ except that if it is made by the attorney of the judgment creditor it need not show his authority to act further than by stating that he is such attorney,²⁰⁰ though the affidavit on which supplementary proceedings are instituted by the attorney for the judgment creditor to enforce his lien for costs must show the status of the attorney.²⁰¹

— **Statements as to judgment.** The affidavit must truly describe the judgment which is the basis of the proceeding,²⁰² and if the judgment docketed is not a correct copy of the judgment rendered, in so far as the names of the parties are concerned, no amendment can be allowed nor can the objection be waived by the party since it goes to the jurisdiction of the judge granting the order.²⁰³ The affidavit must state that the judgment has been docketed before the issuance of the execution,²⁰⁴ and name the court which rendered the judgment,²⁰⁵ and state in whose favor the judgment was rendered;²⁰⁶ but it need not state that the court rendering judgment is a court of record,²⁰⁷ nor state that the judgment was docketed in the county of the venue where it is stated that a transcript was duly filed and docketed in another county.²⁰⁸ The amount of the judgment should also be stated. If based on the transcript of a justice's judgment, the affidavit must set forth the filing of a transcript in the county clerk's office,²⁰⁹ though a failure to so state may be remedied by amendment.²¹⁰ Except where the judgment was in favor of defendant, the affidavit must state

¹⁹⁹ Hawes v. Barr, 30 Super. Ct. (7 Rob.) 452.

²⁰⁰ Miller v. Adams, 52 N. Y. 409.

²⁰¹ Russell v. Somerville, 4 Month. Law Bul. 3.

^{202, 203} Kennedy v. Weed, 10 Abb. Pr. 62.

²⁰⁴ Merely stating that judgment roll was filed is insufficient. Hawes v. Barr, 30 Super. Ct. (7 Rob.) 452.

²⁰⁵ Webster v. Sawens, 3 How. Pr. (N. S.) 320; Kress v. Morehead, 8 State Rep. 858, 26 Wkly. Dig. 410.

²⁰⁶ Kress v. Morehead, 8 State Rep. 858, 26 Wkly. Dig. 410.

²⁰⁷ Sayer v. MacDonald, 2 How. Pr. (N. S.) 119.

²⁰⁸ Ludlow v. Mead, 21 State Rep. 435, 3 N. Y. Supp. 321.

²⁰⁹ People v. Oliver, 66 Barb. 570.

²¹⁰ Kennedy v. Thorp, 3 Abb. Pr. (N. S.) 131, 2 Daly, 258.

that the judgment was rendered on defendant's appearance or personal or substituted service of summons on him, though it is not necessary to so state where such facts appear in the judgment roll, referred to in the affidavit.²¹¹ It is not necessary to state facts to show that the court rendering the judgment had jurisdiction,²¹² notwithstanding the judgment was rendered by a court of special jurisdiction.²¹³

—**Statements as to execution.** The affidavit must show that the execution issued was one against property,²¹⁴ and that the execution was issued within five years, or if after such time, that leave of court was obtained,²¹⁵ and that the execution was issued to the proper county,²¹⁶ and that the execution was issued out of a court of record;²¹⁷ but an allegation stating that judgment was recovered in the supreme court and that execution was duly issued on said judgment, sufficiently shows that the execution was issued out of a court of record.²¹⁸ Where the affidavit states that the transcript was filed and docketed in the county clerk's office on a certain day, and that the same day an execution was "duly issued" it will be presumed, in support of the affidavit, as against a motion to vacate, that the execution was issued after the filing of the transcript.²¹⁹ However, if facts relating to the issuance of the execution which are omitted from the affidavit are shown by the judgment roll, the order will not be vacated.²²⁰

²¹¹ *Sayer v. MacDonald*, 2 How. Pr. (N. S.) 119.

²¹², ²¹³ *Conway v. Hitchins*, 9 Barb. 378, 382.

²¹⁴ *People v. Hulburt*, 5 How. Pr. 446, 9 N. Y. Leg. Obs. 245, Code R. (N. S.) 75.

²¹⁵ *Hutson v. Weld*, 38 Hun, 142.

²¹⁶ *Schenck v. Irwin*, 60 Hun, 361, 38 State Rep. 603, 21 Civ. Proc. R. (Browne) 96, 15 N. Y. Supp. 55. Alternative statement that execution was issued to county of residence "or" county where he has a place of business is insufficient. *Leonard v. Bowman*, 40 State Rep. 135, 21 Civ. Proc. R. (Browne) 237, 15 N. Y. Supp. 822; *Zelie v. Vroman*, 22 Misc. 486, 50 N. Y. Supp. 836. So allegation that execution was issued to county where the debtor or his agent has a place of business is bad. *Bank of Port Jefferson v. Darling*, 102 App. Div. 431.

²¹⁷ *Joyce v. Spafard*, 9 Civ. Proc. R. (Browne) 342; *Webster v. Sawens*, 3 How. Pr. (N. S.) 320.

²¹⁸, ²¹⁹ *Webster v. Sawens*, 3 How. Pr. (N. S.) 320.

²²⁰ *Binghamton Trust Co. v. Grant*, 65 App Div. 178, 72 N. Y. Supp. 580.

— **Statement as to residence.** The affidavit must state the residence of the judgment debtor at the time the proceedings were instituted.²²¹ If the debtor is a resident, it is sufficient to allege either that he resides, or that he has a regular place of business for the transaction of business in person, within the county to which execution was issued;²²² but such statement should not follow the alternative wording of the statute that he is a resident or has a place of business within the county;²²³ though if the judgment debtor both reside and have a place of business in the county to which the execution was issued, that fact may be properly alleged in the conjunctive.²²⁴

— **Statement as to previous applications.** An ex parte application must contain a statement as to whether any previous application has been made and the details thereof.²²⁵

§ 2349. Affidavit for examination of judgment debtor after return.

In addition to the facts already set forth which must be included in all affidavits used to institute supplementary proceedings, it is necessary, in an affidavit for the examination of the debtor after execution returned, to show that within ten years an execution against the property of the judgment debtor has been returned wholly or partly unsatisfied. It is customary to state in the affidavit that “the said sheriff has returned said execution wholly (or ‘partly’) unsatisfied and that the said judgment remains wholly (or ‘partly’) unpaid,” though it has been held that an affidavit made on the return of an execution, partly unsatisfied, should specify the amount remaining un-

²²¹ Matter of Gagnon, 32 App. Div. 22, 52 N. Y. Supp. 309. The requirement is jurisdictional. Schenck v. Irwin, 60 Hun, 361, 15 N. Y. Supp. 55; Lawyers’ Title Ins. Co. v. Stanton, 84 N. Y. Supp. 468.

²²² Kellogg v. Freeman, 2 City Ct. R. 147.

²²³ Id.; Arnot v. Wright, 55 Hun, 561, 29 State Rep. 425, 9 N. Y. Supp. 15.

²²⁴ Arnot v. Wright, 55 Hun, 561, 29 State Rep. 425, 9 N. Y. Supp. 15.

²²⁵ Rule 25 of the General Rules of Practice; Bean v. Tonnelle, 24 Hun, 353, 1 Civ. Proc. R. ¶(McCarthy) 33. Contra, Schanck v. Conover, 56 How. Pr. 437; Sayer v. MacDonald, 2 How. Pr. (N. S.) 119. The last two decisions were rendered before the amendment of rule 25.

Art. V. Procuring Order for Examination.—Form.

paid,²²⁶ but omission to so state is not a jurisdictional defect.²²⁷ The affidavit need not state that defendant has property.²²⁸

—— Form of affidavit.

[Title of court.]

In the matter of the proceedings supplementary to execution upon the judgment in the action entitled ———, plaintiff, against ———, defendant.

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That on the ——— day of ———, 190—, a judgment was rendered in the above-entitled action by the ——— court of the state of New York, in favor of ——— against ———, for ——— dollars.

III. That the judgment roll thereon was filed in the office of the county clerk of the county of ———, on the ——— day of ———, 190—, and said judgment was duly docketed on said ——— day of ———, 190—, in the office of the county clerk of the county of ———.²²⁹

IV. [If judgment for plaintiff, add:] That said judgment was rendered on the said judgment debtor's personal appearance (or "on the personal service of summons on judgment debtor," or "on a substituted service of summons on the judgment debtor as provided for by section 436 of the Code").

V. That said judgment is now owned by this deponent. [If title has accrued by assignment or death of creditor, state facts. If affidavit is made by one other than the judgment creditor or his attorney state facts showing authority to make affidavit.]

VI. That thereafter an execution was duly issued on said judgment out of said court, which is a court of record, on the ——— day of ———, 190—, against the property of said ———, to the sheriff of the county of ———, where the said ——— resided (or "had a regular place for the transaction of business in person") at the time of the commencement of this proceeding.²³⁰

VII. That said execution has been returned by said sheriff wholly

²²⁶, ²²⁷ *Douglass v. Mainzer*, 40 Hun, 75.

²²⁸ *Hough v. Kohlin*, Code R. (N. S.) 232; *Anon.*, 5 Super. Ct. (3 Sandf.) 725, Code R. (N. S.) 113; *Hatch v. Weyburn*, 8 How. Pr. 163.

²²⁹ If judgment was rendered by justice state facts as to filing of transcript.

²³⁰ If the debtor is a nonresident that fact should be stated and instead of the last clause there should be substituted "where the judgment roll was filed" or "where the transcript of the judgment is filed."

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unsatisfied and that the said judgment remains wholly unpaid. [If execution was returned partially satisfied, so state and specify the amount remaining unpaid on the judgment.]

VIII. That no previous application has been made for this order.

[Jurat.]

[Signature.]

§ 2349a. **Affidavit for examination of judgment debtor before return.**

If supplementary proceedings are instituted and an examination of the judgment debtor is desired before the return of the execution, proof must be made, in addition to the facts already set forth as necessary in all affidavits for an examination in supplementary proceedings, by affidavit or other competent written evidence, that the judgment debtor has property which he has unjustly refused to apply toward the satisfaction of the judgment.²³¹ The affidavit should show that a demand has been made on the debtor to apply his property on the debt and that he has refused.²³² Facts must be stated to show an unjust refusal to apply property,²³³ but an affidavit following the words of the statute is not so defective as to preclude proof of the omitted facts on a motion to set aside the order.²³⁴ It seems that the order for examination may be successfully opposed on the ground that the property defendant refused to apply on the judgment was subject to levy and sale on execution.²³⁵

— Form of affidavit.

[Same as preceding affidavit down to VII.]

VII. That said execution has not been returned by said sheriff and said judgment is wholly unsatisfied.

VIII. That said judgment debtor, ———, has property consisting of ———, which he unjustly refuses to apply to the satisfaction of the judgment; that on the ——— day of ———, 190—, and after the is—

²³¹ Code Civ. Proc. § 2436.

²³² *Hutson v. Weld*, 38 Hun, 142; *Levy v. Beacham*, 64 Hun, 62, 46 State Rep. 51, 18 N. Y. Supp. 748.

²³³ *Matter of First Nat. Bank of Albany*, 52 App. Div. 601, 65 N. Y. Supp. 439.

²³⁴ *First Nat. Bank of Rome v. Wilson*, 13 Hun, 232.

²³⁵ *Kreiser v. Kitaoka*, 36 Misc. 174, 73 N. Y. Supp. 164, and cases cited.

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suance of the said execution, a demand was made by ———, on said judgment debtor, to apply his said property to the satisfaction of said judgment, but he has neglected and refuses so to do.

IX. That no previous application has been made for this order.

[Jurat.]

[Signature.]

§ 2349b. Affidavit for examination of third person.

Where the examination of a third person or a corporation is sought, on the ground that he or it is indebted to the judgment debtor or has in possession personal property belonging to the judgment debtor it is necessary, in addition to the requirements already laid down as applicable to all affidavits, that proof be made by affidavit or other competent written evidence, that such person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars.²³⁶ Formerly it was not necessary to state that the value of the property exceeds ten dollars, but such limitation applied only to an indebtedness.²³⁷ An affidavit in the alternative that such person or corporation has personal property of the judgment debtor exceeding ten dollars in value “or” is indebted to him in a sum exceeding ten dollars is insufficient.²³⁸ It is not necessary to allege that execution has been returned unsatisfied,²³⁹ but it must be alleged either that the execution has been returned wholly or partly satisfied or that it has not been returned.²⁴⁰ If the affidavit is made before the return of execution, it need not, it seems, show a demand for payment or delivery of possession.²⁴¹ Though there are cases,²⁴² principally based on dicta of the court of appeals,²⁴³ holding that an affidavit for a third person order is sufficient

²³⁶ Code Civ. Proc. § 2441.

²³⁷ *Brett v. Browne*, 1 Abb. Pr. (N. S.) 155.

²³⁸ *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99; *Lee v. Heirberger*, 1 Code R. 38; *Collins v. Beebe*, 54 Hun. 318, 27 State Rep. 4, 7 N. Y. Supp. 442; *Leonard v. Bowman*, 21 Civ. Proc. R. (Browne) 237, 40 State Rep. 135, 15 N. Y. Supp. 822.

²³⁹ *Seeley v. Garrison*, 10 Abb. Pr. 460.

²⁴⁰ Code Civ. Proc. § 2441.

²⁴¹ *Potts v. Davidson*, 1 How. Pr. (N. S.) 216.

²⁴² *Tefft v. Epstein*, 17 Civ. Proc. R. (Browne) 168, 7 N. Y. Supp. 897; *Grinnell v. Sherman*, 33 State Rep. 27, 11 N. Y. Supp. 682, 19 Civ. Proc.

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to confer jurisdiction though the statement as to indebtedness or possession of property of the judgment debtor is wholly on information and belief, yet the better opinion is that such an affidavit is not sufficient to sustain an order unless the sources of the information and grounds of belief appear in the affidavit.²⁴⁴ But an order based on such an affidavit is not void and must be obeyed until it is vacated.²⁴⁵ Furthermore, a positive statement by the managing clerk of the plaintiff's attorney, alleging the possession of personal property of the debtor, will be presumed to be made on personal knowledge.²⁴⁶ A general allegation in the affidavit, as to indebtedness or possession of property, is sufficient to confer jurisdiction, though substantially in the words of the statute.²⁴⁷ It is not necessary that positive proof be presented that the person sought to be examined actually has property of, or is indebted to, the judgment debtor, but it is sufficient that the proof shall satisfy the judge.²⁴⁸ A third person cannot avoid an examination by his affidavit asserting his ownership of the property and showing the facts in regard thereto.²⁴⁹

— Form of affidavit.

[Same as preceding affidavit down to VII.]

VII. [State whether execution has been returned and how, and that judgment is unsatisfied.]

VIII. That ———, of the city of ———, county of ———, New York,

R. (Browne) 139; *Cooman v. Board of Education of Rochester*, 37 Hun, 96.

²⁴³ *Miller v. Adams*, 52 N. Y. 409, 415.

²⁴⁴ *Matter of Leslie*, 19 Misc. 667, 78 State Rep. 1103, 44 N. Y. Supp. 1103, which reviews the conflicting decisions; *Matter of Parrish*, 28 App. Div. 22, 50 N. Y. Supp. 735; *People v. Jones*, 1 Abb. N. C. 172; *Carley v. Tod*, 56 App. Div. 170, 67 N. Y. Supp. 640; *Lockwood v. Sello*, 27 Misc. 826, 57 N. Y. Supp. 816; *Matter of First Nat. Bank of Earlville*, 99 App. Div. 20, 90 N. Y. Supp. 941.

²⁴⁵ *Matter of Parrish*, 28 App. Div. 22, 25, 50 N. Y. Supp. 735.

²⁴⁶ *Bruen v. Nickels*, 30 App. Div. 396, 51 N. Y. Supp. 352; followed in *Bucki v. Bucki*, 26 Misc. 69, 56 N. Y. Supp. 439.

²⁴⁷ *Davis v. Herrig*, 65 How. Pr. 290.

²⁴⁸ *Carley v. Tod*, 56 App. Div. 170, 67 N. Y. Supp. 640.

²⁴⁹ *Matter of De Leon*, 63 App. Div. 41, 71 N. Y. Supp. 380.

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has property of said ———, exceeding ten dollars in value [or “is indebted to ——— in an amount exceeding ten dollars”].

IX. That no previous application has been made for this order.

[Jurat.]

[Signature.]

§ 2349c. For second examination.

A second examination should not be allowed except for good cause shown by affidavit.²⁵⁰ If there has been one examination and another examination is afterwards sought, the affidavit should show the existence of after-acquired property;²⁵¹ and, it seems, that an alias execution has been issued.²⁵² The facts should be stated so far as possible, as to the after-acquired property.²⁵³ An allegation of subsequently acquired property, on information and belief, where no grounds of belief are stated, is insufficient.²⁵⁴ Omission to specify the first proceedings, in the affidavit, may be cured by amendment.²⁵⁵

—— Form of affidavit.

[Title of court.]

In the matter of the examination of ———, a judgment debtor, in proceedings supplementary to execution on a judgment in an action entitled ——— v. ———.

[Venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That heretofore, on the ——— day of ———, this deponent obtained an order herein for the examination of ———, the judgment debtor, a copy of which said order and the affidavit on which it was founded are hereto annexed and form a part of this affidavit.

III. That said order was duly served on the judgment debtor on the ——— day of ——— but the judgment herein remains wholly unpaid.

IV. That after the service of said order, and on or about the ———

²⁵⁰ Canavan v. McAndrew, 20 Hun, 46.

²⁵¹ Marshall v. Link, 20 Civ. Proc. R. (Browne) 109, 13 N. Y. Supp. 224; Rallings v. Pitman, 49 Super. Ct. (17 J. & S.) 307.

²⁵² Losee v. Allen, 17 Misc. 275, 40 N. Y. Supp. 349.

²⁵³ Rallings v. Pitman, 49 Super. Ct. (17 J. & S.) 307; Losee v. Allen, 17 Misc. 275, 40 N. Y. Supp. 349.

²⁵⁴ McGuire v. Schroeder, 31 Misc. 179, 63 N. Y. Supp. 968; Schermerhorn v. Owens, 29 Misc. 674, 62 N. Y. Supp. 763.

²⁵⁵ Goodall v. Demarest, 2 Hilt. 534.

 Art. VI. Order for Examination.—A. Order to Appear.

day of ———, said judgment debtor received and became the owner of the following property of which he is still the owner, viz.: ———.

V. That no previous application, except as stated above, for this order, has been made.

[Jurat.]

[Signature.]

ART. VI. ORDER FOR EXAMINATION.

(A) ORDER TO APPEAR.

§ 2350. Discretion of judge.

The right to an order for the examination of a judgment debtor is not discretionary when the affidavit of the judgment creditor complies with the requirements of the statute.²⁵⁶ But it seems that there is a certain amount of discretion to be exercised in granting a third person order since, in such case, proof of the essential facts must be “to the satisfaction of the judge.”²⁵⁷

§ 2351. Title.

The order should not be entitled in the original action,²⁵⁸ but as an order in a special proceeding before a judge out of court.²⁵⁹ An order made by a county judge, where the judgment was rendered by the supreme court, is properly entitled in the supreme court.²⁶⁰

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The order need not recite the facts necessary to confer jurisdiction though it is the better practice so to do.²⁶¹ But it has

²⁵⁶ Eleventh Ward Bank v. Heather, 22 Misc. 87, 48 N. Y. Supp. 449, 5 Ann. Cas. 80.

²⁵⁷ See post, § 2353.

²⁵⁸ Milliken v. Thomson, 12 Civ. Proc. R. (Browne) 168, 54 Super. Ct. (12 J. & S.) 393, 8 State Rep. 106.

²⁵⁹ Davis v. Turner, 4 How. Pr. 190.

²⁶⁰ Ackerly & Gerard Co. v. Partz, 39 State Rep. 17, 20 Civ. Proc. R. (Browne) 382, 14 N. Y. Supp. 466.

²⁶¹ People v. Oliver, 66 Barb. 570, 575. A recital in the order that the necessary facts have been shown by affidavit is prima facie sufficient. Rugg v. Spencer, 59 Barb. 383.

been held that an order in proceedings based on an execution issued on a transcript of a judgment of a lower court must state all the jurisdictional facts relating to the filing and docketing of the transcript.²⁶² A recital in the order that execution was returned unsatisfied cannot be collaterally attacked.²⁶³

— **Time of examination.** The order must specify the time when the person to be examined must appear.²⁶⁴ An order returnable on Sunday is a nullity.²⁶⁵

— **Place of examination.** The order must state the place at which the person to be examined is to attend,²⁶⁶ except where it appoints a referee, in which case the time and place for the appearance of the judgment debtor before him, may, it seems, be left to be designated by the referee.²⁶⁷

If the judgment debtor or other person required to attend and be examined, or the officer of a corporation required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the state, or then has an office within the state for the regular transaction of business in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.²⁶⁸ Observe that this Code section applies to an order to examine a third person as well as to an order to examine a judgment debtor, so as to protect third persons from being taken away from their business any considerable distance.²⁶⁹ A nonresident having no place of business can only be examined in the county where

²⁶² *Day v. Brosnan*, 6 Abb. N. C. 312.

²⁶³ *Lisner v. Topplitz*, 86 App. Div. 1, 83 N. Y. Supp. 423.

²⁶⁴ Code Civ. Proc. §§ 2435, 2436, 2441.

²⁶⁵ *Arctic Fire Ins. Co. v. Hicks*, 7 Abb. Pr. 204.

²⁶⁶ Code Civ. Proc. §§ 2435, 2436, 2441. Subsequent giving of notice does not remedy the defect. *Kelty v. Yerby*, 31 How. Pr. 95.

²⁶⁷ *Redmond v. Goldsmith*, 2 Month. Law Bul. 19.

²⁶⁸ Code Civ. Proc. § 2459. This prohibition does not apply to witnesses subpoenaed to testify in such proceedings. *Foster v. Wilkinson*, 37 Hun, 242.

²⁶⁹ Compare, however, *Merrill v. Allin*, 46 Hun, 623, 13 State Rep. 20, 28 Wkly. Dig. 20.

the judgment roll is filed.²⁷⁰ But the mere fact that the principal place of business of the person to be examined is in one county does not preclude the right to order him to appear in another county in which he has “an office for the regular transaction of business in person.”²⁷¹ Where the judgment debtor resides in one county when the judgment is recovered and execution issued and returned but thereafter removes to another county before the commencement of supplementary proceedings, the order may require him to appear in the latter county though it is not “the county to which execution was issued.”²⁷²

— **Judge before whom to appear.** An order requiring a person to attend and be examined must require him so to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein.²⁷³ The order should direct the person to be examined to appear before the judge making the order or a referee,²⁷⁴ except that where the order is made by a justice of the supreme court who does not reside within the judicial district embracing the county to which the execution was issued, it must be made returnable to a justice of the supreme court residing in that district or to a county judge or special county judge or special surrogate, of that or an adjoining county.²⁷⁵ This Code exception applies

²⁷⁰ If he has a place of business then he must be examined in the county wherein such business is located. *Anway v. David*, 9 Hun, 296.

²⁷¹ *McEwan v. Burgess*, 15 Abb. Pr. 473. Office must, however, be for transaction of business “in person” and not through agents. *Brown v. Gump*, 59 How. Pr. 507.

²⁷² *Gould v. Moore*, 51 How. Pr. 188. See, also, *Bingham v. Disbrow*, 37 Barb. 24.

²⁷³ Code Civ. Proc. § 2442. Order may appoint a referee. *Hulsaver v. Wiles*, 11 How. Pr. 446.

²⁷⁴ Order should not be made returnable before the “court.” *Haggerty v. Rogers*, 15 Abb. Pr. 314, note. Where the order has been made returnable before the wrong justice, jurisdiction is not conferred by the appearance of the defendant and his failure to raise the objection. *Blanchard v. Reilly*, 11 Civ. Proc. R. (Browne) 278. See, also, *Driggs v. Smith*, 47 How. Pr. 215. Compare, as contra, *Amundon v. Wolcott*, 15 Abb. Pr. 314.

²⁷⁵ Next to last sentence of Code Civ. Proc. § 2434, which sentence is very much involved because of the introductory words “in that case.”

 Art. VI. Order for Examination.—A. Order to Appear.—Contents.

to an order for the examination of a third person.²⁷⁶ That the order requires the debtor to appear before the “judge of the county court of * * * county” instead of before the “county judge of * * * county” is not fatal.²⁷⁷ An order requiring the judgment debtor to appear before the justice granting the order “or some other justice of this court at chambers” is not irregular since the alternative words are merely surplusage;²⁷⁸ but failure to specify before whom subsequent proceedings are to be had is irregular.²⁷⁹ An order to appear before a referee for examination may direct that the debtor appear before the judge on the Monday succeeding the close of the examination.²⁸⁰ An order providing that subsequent proceedings be had before the judge making it does not prevent the institution of proceedings before another judge against another defendant.²⁸¹

In the first judicial district all orders for the examination of parties or witnesses in supplementary proceedings must be made returnable before the justice assigned to hold part 2 of the special term, unless made returnable before a referee or commissioner under express statutory authority.²⁸²

— Form of order for examination of judgment debtor.

[Title of court and venue.]

In the matter of the proceedings supplementary to execution on the judgment in an action entitled ———, plaintiff, against ———, defendant.

The courts have held that such words do not apply merely to the preceding sentence which regulates the jurisdiction where execution is issued out of a court other than the supreme court but also apply where execution is issued from the supreme court. *Peck v. Baldwin*, 58 Hun, 308, 11 N. Y. Supp. 792; *Browning v. Hayes*, 41 Hun, 382. *Contra*, *Blanchard v. Reilly*, 11 Civ. Proc. R. (Browne) 278.

²⁷⁶ *Gildersleeve v. Lester*, 69 Hun, 344, 53 State Rep. 316, 23 N. Y. Supp. 471; *Matter of Conklin*, 57 N. Y. Supp. 844.

²⁷⁷ *Kress v. Morehead*, 8 State Rep. 858, 26 Wkly. Dig. 410.

²⁷⁸ *Bank for Savings v. Hope*, 8 Daly, 316.

²⁷⁹ *Shults v. Andrews*, 54 How. Pr. 376, 6 Wkly. Dig. 156.

²⁸⁰ *Sickels v. Hanley*, 4 Abb. N. C. 231.

²⁸¹ *First Nat. Bank of Rome v. Dering*, 8 Wkly. Dig. 261.

²⁸² Rule 5 of First Dept. of Sup. Ct.

Art. VI. Order for Examination.—A. Order to Appear.—Contents.

It appearing to my satisfaction, by the [above] affidavit [or "On reading and filing the affidavit"] of ——— who is ———, that judgment has been recovered in this action against the above named ———, the judgment debtor, in the ——— court, on the ——— day of ———, 190—, for the sum of ——— dollars; that said judgment was for twenty-five dollars and upwards; that the judgment roll was filed in the office of the clerk of the county of ——— on the ——— day of ———, 190—; that said judgment was duly docketed in the office of the clerk of the county of ———, on the ——— day of ———, 190—; that thereafter an execution upon said judgment against the property of the defendant, ———, the judgment debtor, was, on the ——— day of ——— 190—, duly issued out of the said ——— court which is a court of record, to the sheriff of the county of ———, where defendant, ———, the judgment debtor, at the time of the commencement of this special proceeding, resided [or "had a place for the regular transaction of business in person"] and that said execution has been returned ——— unsatisfied, and that said judgment still remains ——— unpaid; that aforesaid judgment was rendered on a personal [or substituted] service of the summons herein on [or "on the personal appearance of"] the said defendant, the judgment debtor;²⁸³ and that no previous application has been made for this order:

I do hereby order and require ———, the judgment debtor, to appear before ———, at ———, on the ——— day of ———, 190—, at ——— o'clock in the forenoon, and on such further days as the court or referee duly appointed shall name, to make discovery on oath concerning ——— property. And the said judgment debtor is hereby forbidden to transfer or make any other disposition of the property belonging to ——— not exempt by law from execution, or in any manner to interfere therewith, until further order in the premises.

Dated at ———, the ——— day of ——— 190—.

—————,
Justice of the supreme court.

§ 2353. Order for examination of third person.

The rules laid down above as to the order apply equally well to an order for the examination of a third person. In addition, the Code provides that the judge "may," in his discretion, require notice of the subsequent proceedings to be given to the

²⁸³ If order is for examination before return of execution insert, in addition, the following: "that said judgment debtor has property consisting of ———, which, after demand, he unjustly refuses to apply to the payment of said judgment."

Art. VI. Order for Examination.—A. Order to Appear.

judgment debtor, in such a manner as he deems just.²⁸⁴ Notice of the final order should ordinarily be required to be given to the debtor though failure to do so does not render the order invalid.²⁸⁵ Notice of the proceedings need not be given to one who claims a valid prior lien on the property.²⁸⁶

— Form of order for examination of third person.

[Same as preceding form down to ordering part and add:]

And that —, of the city of —, county of —, New York, has property of said —, the judgment debtor, exceeding ten dollars in value [or “is indebted to —, the judgment debtor, in an amount exceeding ten dollars”].

I do hereby order and require the said — to appear before —, at —, at the — on the — day of —, 190—, at — o'clock in the — noon, and on such further days as the court or referee duly appointed shall name, to be examined concerning the same. And the said — is hereby forbidden to transfer or make any other disposition of any property belonging to said —, the judgment debtor, not exempt by law from execution, or in any manner to interfere therewith until further order in the premises.

Dated at —, the — day of — 190—.

[Signature.]

§ 2354. Order for second examination.

It would seem to be the better practice to insert in the order for a second examination the fact that property has been subsequently acquired, and the second examination should be limited to the time when the previous one was concluded.²⁸⁷ A second order does not supersede the first or affect pending contempt proceedings for its violation.²⁸⁸

§ 2355. Service.

An order requiring a person to attend and be examined must be served as follows:

²⁸⁴ Code Civ. Proc. § 2441; Seeley v. Garrison, 10 Abb. Pr. 460; Ward v. Beebe, 17 Abb. Pr. 1.

²⁸⁵ Ward v. Beebe, 15 Abb. Pr. 372; Gibson v. Haggerty, 37 N. Y. 555; Pommerantz v. Bloom, 32 Misc. 754, 65 N. Y. Supp. 671.

²⁸⁶ Corning v. Glenville Woolen Co., 14 Abb. Pr. 339.

²⁸⁷ Goodall v. Demarest, 2 Hilt. 534.

²⁸⁸ Walter v. Pecare, 32 State Rep. 841, 11 N. Y. Supp. 146.

 Art. VI. Order for Examination.—A. Order to Appear.—Service.

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.

2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient if made upon an officer to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation, unless the officer is specially designated by the judge, as prescribed in section 2444 of the Code.²⁸⁹

Service of the order on the person to be examined cannot be dispensed with,²⁹⁰ though a third person order need not be served on the judgment debtor,²⁹¹ unless the order so requires. Where a judgment debtor who had been duly served with an order in supplementary proceedings, moved to vacate it, which motion was denied with a direction that he appear on a subsequent day, the second order need not be personally served.²⁹² It seems that the order may be served anywhere within the state. An objection to the service of the order beyond the territorial limits of the court,²⁹³ or the omission to show the original order,²⁹⁴ is waived by appearing and answering after the return thereof, unless the appearance is special. The order must be served before the return day, or no jurisdiction is acquired.²⁹⁵ The order must be served personally.²⁹⁶

²⁸⁹ Code Civ. Proc. § 2452.

²⁹⁰ *Benjamin v. Myers*, 3 State Rep. 284. An order cannot be made extending a receivership on the testimony of a witness who has been subpoenaed and examined before the return day of the order in supplementary proceedings, and without service of the order requiring the attendance of the debtor. *Id.* A receiver cannot be appointed before an order or warrant to be examined is served on the judgment debtor, without notice to him, unless he cannot after due diligence be found in the state. *Morgan v. Von Kohnstamm*, 9 Daly, 355.

²⁹¹ *Lynch v. Johnson*, 46 Barb. 56.

²⁹² *Johnson v. Tuttle*, 17 Abb. Pr. 315.

²⁹³ *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. (N. S.) 517.

²⁹⁴ *Newell v. Cutler*, 19 Hun, 74; *Billings v. Carver*, 54 Barb. 40.

²⁹⁵ Appearance to raise objection does not confer jurisdiction. *Henderson v. Stone*, 32 Super. Ct. (2 Sweeny) 468, 40 How. Pr. 333.

²⁹⁶ *Barker v. Johnson*, 4 Abb. Pr. 435.

Formerly it was not necessary that the affidavit be served with the order,²⁹⁷ but now the Code requires it. The copy of the affidavit served with the order must contain the copy signature of the affiant and of the officer administering the oath.²⁹⁸ But a variance in the copy of the affidavit served, where not misleading, is immaterial, and does not excuse the person to be examined from attending and being sworn.²⁹⁹

— **Proof of service.** Proof of service of the order should be by the affidavit of the person making the service.³⁰⁰ The sheriff's certificate is not sufficient proof of service since it is not made evidence by the statute and the order is not technically process.³⁰¹ Insufficient proof of service of the order is waived by an appearance on the return day³⁰² unless such appearance is special.

— **Form of proof of service of order.**

[Title and venue.]

A. X., being duly sworn, says: that he is over the age of twenty-one years; that on the ——— day of ——— 190—, at ——— he served upon ———, the judgment debtor, personally, copies of the within affidavit and order, and left the same with the said ———, and at the same time and place exhibited to ——— the within originals of affidavit and order, and signature of the ———. And that he knew the said ——— to be the individual mentioned and described in said affidavit and order.

[Jurat.]

[Signature.]

§ 2356. **Filing.**

The judgment debtor may compel the judgment creditor to file the order for the examination and the affidavits on which it was granted, notwithstanding the judgment has been satis-

²⁹⁷ *Green v. Bullard*, 8 How. Pr. 313; *Utica City Bank v. Buell*, 9 Abb. Pr. 385, 17 How. Pr. 498; *First Nat. Bank of Rome v. Wilson*, 13 Hun, 232.

²⁹⁸ *National Print Co. v. Patterson*, 4 Month. Law Bul. 64.

²⁹⁹ *Matter of Wyman*, 76 App. Div. 292, 78 N. Y. Supp. 546.

³⁰⁰ See *De Witt v. Dennis*, 30 How. Pr. 131.

³⁰¹, ³⁰² *Utica City Bank v. Buel*, 17 How. Pr. 498, 9 Abb. Pr. 385.

fied and an order obtained for the discontinuance of the supplementary proceedings.³⁰³

§ 2357. Effect.

The service of the preliminary order for examination gives the person instituting the proceedings an equitable lien on the debtor's property or any interest he has in property.³⁰⁴ The lien on equitable assets, acquired by the service of the order for examination, is not extinguished by the death of the judgment debtor, even before the appointment of a receiver, but it survives his death, and is a lien on such assets in the hands of his administrator.³⁰⁵ The lien is perfected and rendered effectual by the order to turn over property or appointing a receiver.³⁰⁶ The equitable lien is converted into a legal lien by the appointment of a receiver and such legal lien relates back to the time of service of the order for examination.³⁰⁷ The priorities are determined by the dates when the order was served and not the date of the appointment of the receiver.³⁰⁸ The mere commencement of supplementary proceedings does not create a lien on the equitable assets of the debtor,³⁰⁹ but the service of the order for examination creates such a lien,³¹⁰ and determines the priority of different judgment creditors.³¹¹ The

³⁰³ *Sinnott v. First Nat. Bank of Hempstead*, 34 App. Div. 161, 54 N. Y. Supp. 417.

³⁰⁴ *Lynch v. Johnson*, 48 N. Y. 27; *Cowdrey v. Carpenter*, 17 Abb. Pr. 107. Lien lost by abandoning proceedings. *Ballou v. Boland*, 14 Hun, 355.

³⁰⁵ *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 648. See, also, *Becker v. Becker*, 47 Barb. 497.

³⁰⁶ *Edmonston v. McLoud*, 16 N. Y. 543; *Duffy v. Dawson*, 22 Civ. Proc. R. (Browne) 235, 19 N. Y. Supp. 186.

³⁰⁷ *McCorkle v. Herrman*, 117 N. Y. 297.

³⁰⁸ *Guggenheimer v. Stephens*, 17 Civ. Proc. R. (Browne) 383, 26 State Rep. 245, 7 N. Y. Supp. 263; *Youngs v. Klunder*, 27 State Rep. 32, 7 N. Y. Supp. 498.

³⁰⁹ *Voorhees v. Seymour*, 26 Barb. 569.

³¹⁰ *Duffy v. Dawson*, 2 Misc. 401, 50 State Rep. 584, 21 N. Y. Supp. 978.

³¹¹ *Matter of Pennsylvania Glass Co.*, 28 Misc. 130, 58 N. Y. Supp. 1067, 29 Civ. Proc. R. (Kerr) 383; *Duffy v. Dawson*, 46 State Rep. 268, 22 Civ. Proc. R. (Browne) 235, 19 N. Y. Supp. 186.

service of the order creates no lien, however, as against other creditors who in the meantime discover property subject to execution and levy on the same.³¹²

§ 2358. Vacation or modification.

If the order is unauthorized or erroneous, a motion to vacate it must be made, as it is no defense to contempt proceedings that the order is irregular unless it is absolutely void.³¹³ The Code provides that an order made "by a judge out of court" may be vacated or modified by the judge who made it, as if it was made in an action; or it, or the order of the judge vacating or modifying it, may be vacated or modified, on motion, "by the court out of which the execution was issued."³¹⁴ The judgment debtor may move to vacate an order for the examination of a third person, where such order enjoins the third person from paying over moneys to the judgment debtor.^{314a}

— **Grounds.** The order may be vacated where it appears to have been improvidently granted,³¹⁵ or where unauthorized,³¹⁶ but not on the ground that the judgment debtor is not a resident of the state.³¹⁷ An order procured pending a levy under a second execution will not be dismissed.³¹⁸ Proceedings will be set aside where a receiver has already been appointed in another proceeding, notwithstanding the attorneys of the judgment creditor have a lien on the judgment.³¹⁹ The mere

³¹² *Becker v. Torrance*, 31 N. Y. 631.

³¹³ See *Hilton v. Patterson*, 18 Abb. Pr. 245.

³¹⁴ Code Civ. Proc. § 2433.

^{314a} *Matter of First Nat. Bank of Earlville*, 99 App. Div. 20, 90 N. Y. Supp. 941.

³¹⁵ *Courtois v. Harrison*, 1 Hilt. 109, 3 Abb. Pr. 96, 12 How. Pr. 359.

³¹⁶ *Moore v. Taylor*, 40 Hun, 56. Where a receiver has been appointed of the property of a judgment creditor, supplementary proceedings thereafter instituted on behalf of such creditor by his original attorneys without authority from the receiver are unauthorized. *Id.*

³¹⁷ *Vredenberg v. Beumont*, 2 City Ct. R. 298.

³¹⁸ See ante, § 2328, note 23.

³¹⁹ *Moore v. Taylor*, 40 Hun, 56.

return of an execution after an order for examination, where it is not shown that the writ was returned satisfied, does not justify the vacation of the order,³²⁰ nor does the issuing of an attachment against defendant as an absent debtor,³²¹ but where the judgment creditor has already examined two persons which has resulted in discovery of sufficient property to satisfy his claim, an order for the examination of another third person will be vacated.³²² The order will not be vacated because the debtor was seized and in possession of real estate within the county at the time the judgment was entered and execution thereon was returned unsatisfied.³²³

Roughly classified the grounds on which a motion to vacate are usually made are as follows:

1. Defects relating to, or discharge of, judgment. Where there appears to be a judgment regularly entered after appearance or personal or substituted service, the person sought to be examined will not ordinarily be heard to attack the judgment collaterally for any irregularity;³²⁴ but it may be shown that the judgment is, and was when rendered, void, and therefore no judgment at all.³²⁵ The proceedings should not be set aside because the judgment proceeded on was entered in violation of an agreement to discontinue the action.³²⁶ The order will not be vacated on an affidavit of the defendant that she had not been personally served with summons, where the

³²⁰ *Lingsweiler v. Lingsweiler*, 18 Civ. Proc. R. (Browne) 81, 57 Super. Ct. (25 J. & S.) 395, 29 State Rep. 354, 9 N. Y. Supp. 305.

³²¹ *Hanson v. Tripler*, 5 Super. Ct. (3 Sandf.) 733, Code R. (N. S.) 154.

³²² *Crane v. Beecher*, 26 State Rep. 233, 6 N. Y. Supp. 225.

³²³ *Eleventh Ward Bank v. Heather*, 22 Misc. 87, 48 N. Y. Supp. 449, 5 Ann. Cas. 80.

³²⁴ *Lederer v. Ehrenfeld*, 49 How. Pr. 403; *Bucki v. Bucki*, 26 Misc. 69, 56 N. Y. Supp. 439; *Wetmore v. Wetmore*, 149 N. Y. 521; *Diossy v. West*, 8 Daly, 298.

³²⁵ *Matter of Stewart*, 39 Misc. 275, 79 N. Y. Supp. 525; *Griffin v. Dominguez*, 9 Super. Ct. (2 Duer) 656. Judgment may be attacked by showing want of service of summons. *Methodist Book Concern & Co. v. Hudson*, 1 How. Pr. (N. S.) 517.

³²⁶ *Gardner v. Lay*, 2 Daly, 113.

judgment had been entered by default and the judgment roll contained an affidavit of personal service, and the judgment recited personal service.³²⁷ Of course, if the judgment is extinguished pending the proceedings, the proceedings should be vacated. A subsequent discharge in insolvency or bankruptcy is ground,³²⁸ and the question of the validity of such discharge cannot be considered,³²⁹ though the court may decide whether the demand evidenced by the judgment existed at the time of the discharge.³³⁰ If there is a conflict as to whether the judgment is paid and satisfied, the motion should be denied, as the proper remedy, in such a case, is to move in the original action to have the judgment declared satisfied of record.³³¹ The order, where granted before twenty years have expired since the entry of the judgment, will not be vacated because the twenty years have expired during the pendency of the proceedings.³³²

2. Defects relating to execution. A motion lies to vacate the order on the ground that no execution was authorized to enforce the judgment or order on which the execution was based,³³³ or that the execution was issued out of the wrong court.³³⁴ But the validity of the execution cannot be inquired into where the execution is not void.³³⁵ Thus, the order will not be vacated because it was issued after the lapse of five years without leave of court.³³⁶ The truth of the return nulla bona

³²⁷ *Greenhall v. Unger*, 20 Misc. 412, 79 State Rep. 1035, 45 N. Y. Supp. 1035.

³²⁸ *Smith v. Paul*, 20 How. Pr. 97.

³²⁹ *Robens v. Sweet*, 48 Hun, 436, 16 State Rep. 334, 1 N. Y. Supp. 839, 28 Wkly. Dig. 417.

³³⁰ But see *Gardner v. Lay*, 2 Daly, 113.

³³¹ *Austin v. Byrnes*, 12 Civ. Proc. R. (Browne) 332, 54 Super. Ct. (22 J. & S.) 552, 8 State Rep. 88; *Williams v. Irving*, 5 T. & C. 671, 1 Hun, 720.

³³² *Driggs v. Williams*, 15 Abb. Pr. 477.

³³³ See *Weber v. Weber*, 93 App. Div. 149, 87 N. Y. Supp. 519.

³³⁴ *Gray v. Lieben*, 8 Civ. Proc. R. (Browne) 48.

³³⁵ *Wright v. Nostrand*, 94 N. Y. 31; *Greenlich v. Rose*, 2 City Ct. R. 174.

³³⁶ *United States Land & Emig. Co. v. Pike*, 2 Month. Law Bul. 31. See ante, § 2344.

cannot be inquired into collaterally on the motion to vacate.³³⁷ But the order may be vacated where the return is one not justifying an examination, where the motion is made promptly before the examination is had.³³⁸

3. Defects in affidavits on which order was granted. A motion to vacate is the proper remedy where the affidavit is defective,³³⁹ as where it fails to allege a demand for application of property,³⁴⁰ or where it fails to state the means of knowledge of affiant's informant,³⁴¹ or where it does not show that the execution was returned within ten years from the time the order was granted.³⁴² Insufficiency of the moving affidavit is, however, not necessarily a ground where the facts omitted are supplied by the judgment roll in the action which is a part of the moving papers.³⁴³ Failure to move waives defects in the title of the affidavit.³⁴⁴

4. Defects in service of order and affidavit. The order will not be vacated merely because of the failure of the judgment creditor to subscribe the copy of the affidavit and the order with his office and place of address,³⁴⁵ but in such case the service of the order may be set aside on notice to the judgment creditor.³⁴⁶ Nor will the order be set aside because a copy of the affidavit served was incorrect in some particulars, where the original affidavit was sufficient,³⁴⁷ nor because the copy of the order served omits the year in which the debtor is to

³³⁷ Eleventh Ward Bank v. Heather, 22 Misc. 87, 48 N. Y. Supp. 449.

³³⁸ Return was that real estate was advertised for sale but no other property was found. Marx v. Spaulding, 35 Hun, 478, affirmed in 99 N. Y. 675. Contra, Forbes v. Spaulding, 52 Super. Ct. (20 J. & S.) 166, 8 Civ. Proc. R. (Browne) 135.

³³⁹ Smith v. Cutter, 64 App. Div. 412, 72 N. Y. Supp. 99.

³⁴⁰ Of course this is true only where application for order was before return of execution. Bowery Bank v. Widmayer, 9 N. Y. Supp. 629.

³⁴¹ Bowery Bank v. Widmayer, 9 N. Y. Supp. 629.

³⁴² McGuire v. Hudson, 41 State Rep. 295, 16 N. Y. Supp. 392.

³⁴³ See Binghamton Trust Co. v. Grant, 65 App. Div. 178, 72 N. Y. Supp. 580.

³⁴⁴ People v. Oliver, 66 Barb. 570, 574.

³⁴⁵, ³⁴⁶ Dorsey v. Cummings, 48 Hun, 76, 15 State Rep. 459.

³⁴⁷, ³⁴⁸ Barrington v. Watkins, 36 App. Div. 31, 55 N. Y. Supp. 97.

Art. VI. Order for Examination.—A. Order to Appear.—Vacation.

appear, where the month and day appear from the copy of the order served.³⁴⁸

An order for a second examination should be vacated unless facts specially justifying a renewal are stated.³⁴⁹ But on the application to vacate a second order, the plaintiff may present further proof than upon the *ex parte* application that the proceeding is not taken to harass defendant but to reach subsequently acquired property.³⁵⁰ A motion to vacate a second order, which second order was granted because defendant refused to verify his deposition, should be granted on condition that defendant make the required verification.³⁵¹

—**Time for motion.** The motion should ordinarily be made on the return day because if the person appears generally without objection and is examined he thereby waives all objections except those which are jurisdictional. Thus, a motion to vacate on the ground that the return of the execution is defective cannot be made after examination, in the absence of prejudice caused by the defect complained of.³⁵² So, after examination, the order will not be vacated because of defects in the service of the order.³⁵³

—**Moving papers.** Allegations in the moving papers may remedy defects in the affidavit on which the order was granted.³⁵⁴

—**Notice of motion.** Notice of the motion should be given to all persons interested.³⁵⁵ The provision of section 772 of the Code which permits the judge, in particular instances, to vacate and modify orders previously made by him, without notice to the adverse party, does not apply to supple-

³⁴⁹ *Grocers' Bank v. Bayaud*, 21 Hun, 203.

³⁵⁰ *Marshall v. Link*, 36 State Rep. 60, 20 Civ. Proc. R. (Browne) 109, 13 N. Y. Supp. 224.

³⁵¹ *Weiss v. Ashman*, 11 Misc. 377, 65 State Rep. 290, 24 Civ. Proc. R. (Scott) 268, 1 Ann. Cas. 314, 32 N. Y. Supp. 161.

³⁵² *Baker v. Herkimer*, 43 Hun, 86, 6 State Rep. 581, 25 Wkly. Dig. 573.

³⁵³ *Newell v. Cutler*, 19 Hun, 74.

³⁵⁴ *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99.

³⁵⁵ *Kennedy v. Norcott*, 54 How. Pr. 87.

Art. VI. Order for Examination.—B. Injunction.

mentary proceedings.³⁵⁶ Such notice must specify the irregularity complained of,³⁵⁷ though it need not point out jurisdictional defects.³⁵⁸

—— **Effect.** Vacating the order does not terminate proceedings under a warrant of arrest obtained after the order, since the two proceedings are independent.³⁵⁹

—— **Opening vacating order.** The order vacating or modifying the order may be vacated or modified, on motion, by the court out of which the execution was issued.³⁶⁰ On vacating an order setting aside an order for examination, the court may order the judgment debtor to appear for examination on the original order before the referee, on a day to be named in the order so as to protect the rights of the creditor.³⁶¹

§ 2359. Appeal.

The right to appeal from an order requiring a person to attend to be examined is governed by the rules already laid down as applicable to all orders made in the course of supplementary proceedings.³⁶²

§ 2360. Collateral attack.

The order cannot be attacked collaterally where the judge had jurisdiction.³⁶³

(B) INJUNCTION.

§ 2361. Time.

Simultaneous with the order for examination or warrant of arrest, by which the supplementary proceeding is instituted,

³⁵⁶ *Dorsey v. Cummings*, 48 Hun, 76, 15 State Rep. 459.

³⁵⁷ *Schnitzer v. Willner*, 7 Misc. 497, 58 State Rep. 45, 27 N. Y. Supp. 970.

³⁵⁸ *Zelie v. Vroman*, 22 Misc. 486, 50 N. Y. Supp. 836.

³⁵⁹ *Frost v. Craig*, 18 Civ. Proc. R. (Browne) 296, 30 State Rep. 848, 9 N. Y. Supp. 528, 16 Daly, 107.

³⁶⁰ Code Civ. Proc. § 2433, subd. 1.

³⁶¹ *Joyce v. Spafard*, 9 Civ. Proc. R. (Browne) 342.

³⁶² Ante, § 2335.

³⁶³ *Lisner v. Topfritz*, 86 App. Div. 1, 83 N. Y. Supp. 423.

or afterwards, an injunction order may be granted.³⁶⁴ Usually such injunction is contained in the order for examination or warrant of arrest.

§ 2362. **Who may make.**

The order may be made by the judge by whom the order for examination or warrant of arrest was granted or to whom it is returnable.³⁶⁵

§ 2363. **Affidavits.**

The order may be granted on the original papers, where made simultaneously with the order for examination or warrant of arrest, or, if made afterwards, on an affidavit showing sufficient grounds therefor.³⁶⁶

§ 2364. **Contents.**

The order may restrain any person or corporation, whether a party or not a party to the special proceedings, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt, concerning which any person is required to attend and be examined, until further direction in the premises.³⁶⁷ A third person sought to be examined may be enjoined until further order of the court,³⁶⁸ but such an order is not a defense to an action on the claim.³⁶⁹

§ 2365. **Service.**

The service of the injunction order is to be made in the same manner as the service of an order requiring a person to attend and be examined.³⁷⁰ An assignment of a debt, in the absence of notice of the order in supplementary proceedings, gives a good title to a bona fide assignee.³⁷¹

³⁶⁴⁻³⁶⁷ Code Civ. Proc. § 2451.

³⁶⁸ Seeley v. Garrison, 10 Abb. Pr. 460.

³⁶⁹ Glenville Woolen Co. v. Ripley, 43 N. Y. 206.

³⁷⁰ Code Civ. Proc. § 2452. See ante, § 2355.

³⁷¹ Lynch v. Johnson, 46 Barb. 56.

§ 2366. Effect.

The injunction does not justify a debtor in refusing to comply with the judgment of a court of competent jurisdiction in an action to which the creditor in the supplementary proceedings is a party.³⁷² The service of an injunction contained in an order for the examination of a third person owing moneys to a judgment debtor creates a lien in favor of the creditor obtaining the order, which is not displaced by a similar order subsequently served on such third person by another creditor, though the last mentioned order was obtained first.³⁷³ Where an order restraining a third person from disposing of the judgment debtor's property "until further order in the premises" is made, an order appointing a receiver is such further order.³⁷⁴

§ 2367. Vacating order.

The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security in such sum and in such a manner as justice requires.³⁷⁵ A motion to dissolve an injunction contained in an order for the examination of a third person should be denied, notwithstanding the judgment debtor has left the jurisdiction of the court, where trustees have been appointed under a will and directed to pay him an annuity.³⁷⁶ What has already been said as to the vacation of the order for examination³⁷⁷ applies to the injunction order.

§ 2368. What constitutes a violation of order.

The question often arises, in contempt proceedings, as to whether a particular act is a violation of the injunction. The following acts have been held to be a violation of the order:

³⁷² *Butler v. Niles*, 35 How. Pr. 329.

³⁷³ *Bevans v. Pierce*, 1 City Ct. R. 259.

³⁷⁴ *People v. Randall*, 73 N. Y. 416.

³⁷⁵ Code Civ. Proc. § 2451.

³⁷⁶ *Seaman v. Pike*, N. Y. Daily Reg., Nov. 24, 1883.

³⁷⁷ See ante, § 2358.

Art. VI. Order for Examination.—B. Injunction.

Using money on deposit;³⁷⁸ executing a general assignment for creditors;³⁷⁹ repayment of a loan;³⁸⁰ payment of rent;³⁸¹ collection of rents and payment on other claims;³⁸² payment by the subtenant of rent due the judgment debtor, the tenant, to the owner of the fee, where it is not shown that the subtenant made the payment on his own behalf or for the protection of his possession;³⁸³ transfer of property liable to execution to attorney in satisfaction of the attorney's claim;³⁸⁴ expenditure of money paid to the debtor, a widow, on an insurance policy on her husband's life;³⁸⁵ sale of mortgaged chattels, though with the consent of the mortgagee who releases his lien, and an application of the proceeds thereof to the debtor's own use;³⁸⁶ conveyance of property pending a stay of proceedings on the judgment;³⁸⁷ father's transfer of his right in an action for damages for negligence resulting in the death of his son on whose estate he has taken out letters of administration;³⁸⁸ confession of judgment, where done with an obvious intent to change the disposition of the debtor's property, to the prejudice of the creditor in the proceed-

³⁷⁸ *Harvey v. Arnold*, 84 App. Div. 132, 82 N. Y. Supp. 155. It is immaterial that deposit was "in trust." *People v. Kingsland*, 3 Abb. Dec. 526; *Jackson v. Murray*, 25 App. Div. 140, 49 N. Y. Supp. 195, 5 Ann. Cas. 78.

³⁷⁹ *Canda v. Gollner*, 73 Hun, 493, 56 State Rep. 153, 26 N. Y. Supp. 449; *National Wall Paper Co. v. Gerlach*, 15 Misc. 640, 37 N. Y. Supp. 428.

³⁸⁰ *Gillett v. Hilton*, 11 Civ. Proc. R. (Browne) 108, which, however, does not correctly state the law as to the disposition of money earned within sixty days.

³⁸¹ *Aschemoor v. Emmvert*, 5 Month. Law Bul. 80.

³⁸² Rents accruing under an existing lease are not after-acquired property. *Stevens v. Dewey*, 13 App. Div. 312, 4 Ann. Cas. 40, 43 N. Y. Supp. 130; *Lertora v. Reimann*, 5 Ann. Cas. 19, 53 N. Y. Supp. 921.

³⁸³ *Browning v. Chadwick*, 30 Misc. 420, 62 N. Y. Supp. 476.

³⁸⁴ *Deposit Nat. Bank v. Wickham*, 44 How. Pr. 421.

³⁸⁵ *Crosby v. Stephan*, 32 Hun, 478.

³⁸⁶ *Millington v. Fox*, 13 N. Y. Supp. 334.

³⁸⁷ *Woolf v. Jacobs*, 36 Super. Ct. (4 J. & S.) 408.

³⁸⁸ *Wynkoop v. Myers*, 17 Civ. Proc. R. (Browne) 443, 26 State Rep. 81, 7 N. Y. Supp. 898.

Art. VI. Order for Examination.—B. Injunction.

ings, and where it has that effect.³⁸⁹ On the other hand, it is not a contempt to pay out or transfer after-acquired property³⁹⁰ or exempt property. For instance, it is not a contempt to pay out earnings for personal services rendered within sixty days.³⁹¹ So it is not a violation of the order to transfer property, the legal title to which is in the debtor's wife,³⁹² since the legal title of the property transferred must have been in the judgment debtor or the person enjoined, at the time of the service of the order, in order to constitute a contempt. The execution by the judgment debtor of one mortgage of a lesser amount for another is not a violation of the order.³⁹³ nor is the collecting the debts of a firm of which the debtor is a member and using the proceeds in the partnership business,³⁹⁴ nor is a sale of goods after the suspension of examination for more than three years.³⁹⁵ So a debtor need not stop payment of checks previously given for a valuable consideration in good faith,³⁹⁶ and the order is not violated by the indorsement of a check in pursuance of an assignment made prior to the institution of supplementary proceedings.³⁹⁷

³⁸⁹ *Ross v. Clussman*, 5 Super. Ct. (3 Sandf.) 676, Code R. (N. S.) 91; distinguishing *Lansing v. Easton*, 7 Paige, 264, as holding that merely confessing judgment is not a violation of the injunction. Where the confession is to secure a debt justly due, it is not a violation of the order. *McCredie v. Senior*, 4 Paige, 378. Compare *Fenner v. Sanborn*, 37 Barb. 610.

³⁹⁰ *Potter v. Low*, 16 How. Pr. 549; *Atkinson v. Sewine*, 11 Abb. Pr. (N. S.) 384; *McGivney v. Childs*, 41 Hun, 607, 5 State Rep. 251; *Duffus v. Cole*, 39 State Rep. 838, 15 N. Y. Supp. 370; *Rainsford v. Temple*, 3 Misc. 294, 22 N. Y. Supp. 937. After-acquired earnings. *Rainsford v. Temple*, 3 Misc. 294, 22 N. Y. Supp. 937.

³⁹¹ *Hancock v. Sears*, 93 N. Y. 79; overruling *Newell v. Cutler*, 19 Hun, 74; followed in *Corde v. Laughlin*, 86 N. Y. Supp. 795. What are such earnings, see ante, § 2332, p. 3263.

³⁹² *Dean v. Hyatt*, 5 Wkly. Dig. 67; *Beard v. Snook*, 47 Hun, 158.

³⁹³ *Duffus v. Cole*, 39 State Rep. 838, 15 N. Y. Supp. 370.

³⁹⁴ *Joline v. Connolly*, 24 Wkly. Dig. 111.

³⁹⁵ *Meyers v. Herbert*, 64 Hun, 200, 45 State Rep. 626, 22 Civ. Proc. R. (Browne) 216, 19 N. Y. Supp. 132.

³⁹⁶ *Fitzgibbons v. Smith*, 41 State Rep. 678, 16 N. Y. Supp. 410.

³⁹⁷ *Rhodes v. Linderman*, 43 State Rep. 520, 17 N. Y. Supp. 628.

ART. VII. WARRANT OF ARREST.

§ 2369. Nature of relief.

Instead of making an order for the examination of the judgment debtor, the judge may issue a warrant of arrest.³⁹⁸ The proceeding is not dependent on a proceeding to obtain an order for the examination of the judgment debtor.³⁹⁹ Or, at any time after the making of the order for examination, and before the close of the examination, the warrant may be issued.⁴⁰⁰ A warrant may be issued against a nonresident judgment debtor.⁴⁰¹

§ 2370. Motion papers.

The proof must consist, in addition to the proof necessary to obtain an order for the examination of the judgment debtor, of an affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the state, or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment.⁴⁰² The affidavit must show what property the debtor has, or, at least, that he has property.⁴⁰³ Allegations as to the defendant's having property are not sufficient if a mere matter of inference, based on the fact that he is of extravagant habits, living expensively.⁴⁰⁴ If danger of concealment is relied on, it must appear or be presumable that such concealment will be within the state.⁴⁰⁵ If the application is made after the granting of an order for examination, the affidavit should recite such order, a copy of which should

³⁹⁸ Code Civ. Proc. § 2437.

³⁹⁹ Frost v. Craig, 18 Civ. Proc. R. (Browne) 198, 9 N. Y. Supp. 528.

⁴⁰⁰ Code Civ. Proc. § 2438.

⁴⁰¹ Denning v. Schieffelin, 26 State Rep. 96, 7 N. Y. Supp. 98.

⁴⁰² Code Civ. Proc. § 2437.

⁴⁰³ Heller v. De Leon, 26 State Rep. 102, 7 N. Y. Supp. 97.

⁴⁰⁴ Netzel v. Mulford, 59 How. Pr. 452.

⁴⁰⁵ Rohshand v. Waring, 1 Abb. N. C. 311.

Art. VII. Warrant of Arrest.

be annexed, and should set forth the facts authorizing an arrest.

— Form of affidavit.

[Same as affidavit to procure order for examination (pp. 3284-3288), and add:]

That said ———, the judgment debtor herein, is about to leave this state [or “conceal himself in this state”], as deponent verily believes, and that the grounds of his belief are as follows: [here state facts].

That there is reason to believe that ———, the judgment debtor herein, has property, to wit: [describe it], which is not exempt from execution, and that the grounds of deponent’s belief are ———; that on the ——— day of ———, 190—, this deponent requested said ——— to apply the said property hereinbefore described toward the satisfaction of said judgment but that said ——— has refused and neglected to apply said property or any part thereof.

That no previous application has been made for this order.

[Jurat.]

[Signature.]

§ 2371. Warrant.

The warrant must recite the facts, and require the sheriff of any county where the judgment debtor may be found, to arrest him, and bring him before the judge issuing the warrant, or before another judge if the case is one where the warrant must be returnable to another judge.⁴⁰⁶ A justice of the supreme court has authority to issue a warrant for the arrest of a judgment debtor residing in the same judicial district, but in a county different from that in which the judge resides, but as a matter of expediency this power should not be exercised where the debtor resides in a distant county unless to prevent a failure of justice.⁴⁰⁷ The warrant may require the debtor to appear before a referee instead of before the judge,⁴⁰⁸ and it is not necessary that the referee be a resident of the same county with the debtor.⁴⁰⁹

Where the facts authorizing an arrest are made to appear, by affidavit, at any time after the making of an order requiring the judgment debtor to attend and be examined and before the close of his examination, the judge may, in addition

⁴⁰⁶ Code Civ. Proc. § 2437.

⁴⁰⁷⁻⁴⁰⁹ *Wilson v. Andrews*, 9 How. Pr. 39.

Art. VII. Warrant of Arrest.

to issuing a warrant, if necessary, direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant, and his decision thereupon.⁴¹⁰

— Form of warrant.

The People of the State of New York to the Sheriff of the County of ———:

Whereas, proof has been made to me by the affidavit of ———, that a judgment was rendered in the ——— court on the ——— day of ———, 190—, on ——— service of the summons on ———, in favor of ——— against ———, for the sum of ——— dollars, damages and costs, and that the judgment roll was filed in the office of the county clerk of ——— county on the ——— day of ———, 190—, and that said judgment was duly docketed in the office of the county clerk of the county of ———, on the ——— day of ———, 190—, and that an execution against the property of ——— was duly issued thereon out of the ——— court, which is a court of record, on the ——— day of ———, 190—, to the sheriff of ——— county, in which county ———, the judgment debtor [resides], and that said execution has been returned by said sheriff wholly unsatisfied and that said judgment remains wholly unsatisfied [or “that said execution has not been returned by said sheriff and said judgment remains wholly unsatisfied”]. And also, on proof, by the affidavit of ———, to my satisfaction, that there is danger that ———, the judgment debtor, will leave the state [“or will conceal himself within the state”] and that there is reason to believe that he has property, to-wit: [describe property as in affidavit], which he unjustly refuses to apply to the payment of the judgment:

You are hereby required to arrest the said ——— and to bring him before me at ——— on the ——— day of ———, 190—, at ——— o'clock in the ———noon, then and there to be dealt with according to law. And this shall be your warrant therefor.

Witness, ———.

———,

Plaintiff's attorney.

———,

Justice of ——— court.

— Service. The sheriff, when he arrests a judgment debtor by virtue of a warrant, must deliver to him a copy of the warrant, and of the affidavit upon which it was granted.⁴¹¹

⁴¹⁰ Code Civ. Proc. § 2438.

⁴¹¹ Code Civ. Proc. § 2453.

§ 2372. Undertaking.

Where a judgment debtor has been arrested and brought before a judge by virtue of a warrant, and it appears to the satisfaction of the judge, from his examination or other proof, that there is danger that he will leave the state or conceal himself, and that he has property which he has unjustly refused to apply to the satisfaction of the judgment, the judge may make an order, requiring him to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect that he will from time to time as the judge directs attend before the judge, or before a referee appointed or to be appointed in the proceedings, and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property which is not exempted from seizure by section 2463 of the Code. If he fails to comply with the order the judge must forthwith, by warrant, commit him to prison, there to remain until the close of the examination or the giving of the required undertaking, except that the judge may direct the sheriff to produce him, from time to time, as required in the course of the proceedings.⁴¹²

— Form of undertaking.

In the matter of the proceedings supplementary to execution on a judgment in an action entitled ———, plaintiff, against ———, defendant.

Whereas, a warrant was issued by Hon. ———, justice of the ——— court, in the above-entitled proceeding, to the sheriff of ——— county, pursuant to section 2437 of the Code of Civil Procedure, requiring the said sheriff to (state requirement of warrant); and

Whereas, the said ——— has been arrested and brought before ———; and

Whereas, it has appeared to the satisfaction of said judge, from the examination of said ——— that there is danger that said ——— will leave the state [or “conceal himself within the state”], and that he has property, to-wit: [describe property], which he has unjustly refused to apply to the satisfaction of the judgment mentioned in said warrant, and an order has thereupon been made by Hon. ———, justice of the ——— court, on the ——— day of ——— 190—, requiring said ———

⁴¹² Code Civ. Proc. § 2440.

 Art. VIII. Examination.—A. Before Whom and Where.

to give an undertaking with [state number] sureties in the sum of ———, on or before the ——— day of ———, 190—;

Now, therefore, we, ———, of the city of ——— [real estate broker] and ———, of the city of ——— [merchant], do hereby jointly and severally undertake, pursuant to the said order and to the provisions of section 2440 of the Code of Civil Procedure, that said ——— will, from time to time, as the said justice directs, attend before said justice [or “———, a referee appointed in these proceedings”] or before any referee hereafter appointed in these proceedings, and that he will not, until discharged from arrest by virtue of said warrant, dispose of any of his property not exempt from seizure by section 2463 of the Code of Civil Procedure.

[Date.]

[Signature.]

[Add justification, acknowledgment, and approval.]

§ 2373. Vacation or modification.

The warrant may be vacated or modified, as prescribed in section 2433 of the Code, with respect to an order.⁴¹³ In other words, the warrant may be vacated or modified in the same way as can an order for the examination of the judgment debtor. Proceedings under the warrant, where obtained after the order for examination, are not terminated by the vacation of such order.⁴¹⁴

ART. VIII. EXAMINATION.

(A) BEFORE WHOM AND WHERE.

§ 2374. Judge or referee.

The person required by an order in supplementary proceedings to attend and be examined must be required to attend and be examined either before the judge to whom the order is returnable or before a referee designated in such order.⁴¹⁵

§ 2375. Place of examination.

The person to be examined, if a resident, cannot be required to attend at a place outside the county wherein his residence

⁴¹³ Code Civ. Proc. § 2439. See ante, §§ 2335, 2358.

⁴¹⁴ Frost v. Craig, 18 Civ. Proc. R. (Browne) 198, 9 N. Y. Supp. 528.

⁴¹⁵ Code Civ. Proc. § 2442.

or place of business is situated.⁴¹⁶ If a nonresident, he can only be required to appear in the county in which the judgment roll is filed, unless he has a place of business within the state, in which case he may be required to appear in such county.⁴¹⁷ An order requiring a judgment debtor to appear for examination at the office of the county judge does not necessarily mean his law office.⁴¹⁸

(B) REFERENCE.

§ 2376. Scope of subdivision.

This subdivision will treat only of matters peculiar to a reference and the powers and duties of the referee. Rules which apply equally well whether the examination is before a judge or referee, such as rules relating to the scope of the examination, will be considered in the following subdivision.

§ 2377. Appointment of referee.

A referee may be appointed in the original order for examination, to take the testimony,⁴¹⁹ or a referee may be appointed afterwards. It is customary, where the order for examination appoints a referee, to state the time when, and the place where, the person to be examined is to attend, but it seems that the order may merely appoint a referee and direct the person to be examined to attend at such time and place as the referee shall fix.⁴²⁰ Section 2443 of the Code provides as follows: ‘‘At any stage of the proceedings, the judge to whom the order is returnable may, in his discretion, make an order directing that any other examination or testimony be taken by, or that a question arising be referred to, a referee, designated in the order. Where a question is so referred, the ref-

⁴¹⁶ Code Civ. Proc. § 2459.

⁴¹⁷ *Anway v. David*, 9 Hun, 296.

⁴¹⁸ *Myers v. Janes*, 3 Abb. Pr. 301.

⁴¹⁹ Code Civ. Proc. § 2442; *Green v. Bullard*, 8 How. Pr. 313; *Hulsaver v. Wiles*, 11 How. Pr. 446.

⁴²⁰ *Redmond v. Goldsmith*, 2 Month. Law Bul. 19. Form of notice of time and place of hearing in action, see ante, § 1875.

eree may be directed to report either the evidence or the facts.⁴²¹ It has been held that this Code section does not apply to an order of reference to examine the debtor or a third person but applies only to incidental questions of fact arising at any stage of the proceeding before a judge to whom the order is returnable.⁴²² The order of appointment need not be incorporated with the order requiring the creditor to appear before the referee for examination.⁴²³ It has been held that a referee will not ordinarily be appointed unless it is apparent that a difficult and protracted examination must ensue,⁴²⁴ but at present it is very seldom that the examination is had before a judge. No order of reference will be made in supplementary proceedings in the city court of New York city.⁴²⁵

The attorney for the judgment creditor is usually allowed to name the referee. The general rules as to who may be referees, apply, and will not be repeated.⁴²⁶ The residence of the referee appointed, with respect to that of the person examined, is immaterial.⁴²⁷ If the referee is objectionable, the judge making the order should be applied to for a change of referee.⁴²⁸

§ 2378. Oath of referee.

Unless the parties expressly waive the referee's oath, a referee must, before entering upon an examination, or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference and make a just and true report, according to the best of his understanding.

⁴²¹ Code Civ. Proc. § 2443. Application of Code provision, see *Maas v. McEntegart*, 21 Misc. 462, 47 N. Y. Supp. 673.

⁴²² *Howe v. Welch*, 11 Civ. Proc. R. (Browne) 445.

⁴²³ *Lewis v. Penfield*, 39 How. Pr. 490.

⁴²⁴ *Hollister v. Spafford*, 5 Super. Ct. (3 Sandf.) 742.

⁴²⁵ Rule 24 of Rules of City Ct.

⁴²⁶ See ante, § 1867; *Gilbert v. Frothingham*, 13 Civ. Proc. R. (Browne) 288.

⁴²⁷ *Bingham v. Disbrow*, 37 Barb. 24.

⁴²⁸ *Tremain v. Richardson*, 68 N. Y. 617.

Art. VIII. Examination.—B. Reference.

The oath may be administered by an officer designated in section 842 of the Code, and must be returned to the judge, with the report or testimony.⁴²⁹ The oath may be waived where the parties are of age, and present, in person or by attorney, by written stipulation or orally. If the waiver is oral it must be entered in the referee's minutes.⁴³⁰

— Form of oath.

[Title of proceeding.]

[Venue.]

I, ———, the referee appointed by an order of Hon. ———, made in the above-entitled proceeding, bearing date the ——— day of ———, 190—, do solemnly swear that I will faithfully and fairly discharge my duty on said reference and will make a just and true report, according to the best of my understanding.

[Jurat.]

[Signature.]

§ 2379. Powers of referee.

The referee has authority to do the following acts.

— **Issuance of subpoena.** Subpoenas may be issued under the hand of the referee before whom the witnesses are to testify.⁴³¹

— Form of subpoena.

The People of the State of New York, to ———, Greeting:

We Command You, That all business and excuses being laid aside, you and each of you appear and attend before ———, Esq., the referee appointed by Hon. ———, at the office of said referee, number ———, in the ———, on the ——— day of ———, 190—, at ——— o'clock in the ———-noon, to testify and give evidence in a certain proceeding now pending in the said court, supplementary to an execution issued on a judgment recovered by ——— against ——— in the ——— court on the ——— day of ———, 190—, on the part of the said judgment ———. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

[Signature of attorney.]

[Signature of referee.]

⁴²⁹ Code Civ. Proc. § 2445. General rules as to oaths of referees in general, see ante, § 1874.

⁴³⁰ Code Civ. Proc. § 1016.

⁴³¹ Knowles v. De Lazare, 8 Civ. Proc. R. (Browne) 386; People v. Ball, 37 Hun, 245.

— **Subpoena duces tecum.** A referee may make an order directing the judgment debtor to produce his books and papers,⁴³² though the debtor is a corporation,⁴³³ but, in the latter instance, a subpoena duces tecum must be served on the officer who has power to produce the books and not on a mere employe.⁴³⁴ A debtor cannot be compelled to leave his books with the referee for examination by the judgment creditor.⁴³⁵

— **Administering oath to witnesses.** A referee has power to administer an oath to the person to be examined⁴³⁶ or witnesses.

— **Adjournments.** The judge or referee may adjourn the proceedings from time to time as he thinks proper.⁴³⁷ The power of a referee to order an adjournment is the same as that of a judge when the examination is had before the judge. The referee may adjourn the proceedings from time to time, without the consent of the debtor.⁴³⁸ The referee may adjourn the hearing to a place other than the one mentioned in the order of reference,⁴³⁹ provided it is not outside the county where the person to be examined resides or has a place of business, or, if the person is a nonresident having no place of business within the state, outside the county where the judgment roll is filed. If the referee is absent on the day set, he can appoint another time for the hearing.⁴⁴⁰ The judge may direct a judgment debtor to appear before a referee to complete his examination where the referee has lost jurisdiction through an irregular adjournment.⁴⁴¹ An application for

⁴³² *Pruden v. Tallman*, 6 Civ. Proc. R. (Browne) 360.

⁴³³ *Holmes v. Stietz*, 6 Civ. Proc. R. (Browne) 362, note; *Pendergast v. Dempsey*, 18 Civ. Proc. R. (Browne) 198, 10 N. Y. Supp. 938.

⁴³⁴ *Wainwright v. Tiffany*, 13 Civ. Proc. R. (Browne) 222.

⁴³⁵ *Barnes v. Levy*, 23 Civ. Proc. R. (Browne) 253, 29 N. Y. Supp. 1076.

⁴³⁶ *Woods v. Ross*, N. Y. Daily Reg., Feb. 4, 1886.

⁴³⁷ Code Civ. Proc. § 2444.

⁴³⁸ *Kaufman v. Thrasher*, 10 Hun, 438.

⁴³⁹ *Weaver v. Brydges*, 85 Hun, 503, 66 State Rep. 742, 33 N. Y. Supp. 132.

⁴⁴⁰ *Allen v. Starring*, 26 How. Pr. 57.

⁴⁴¹ *Kaufman v. Thrasher*, 10 Hun, 438.

a stay of the examination and proceedings because of the ill health of plaintiff should be made to the referee and not to the judge who made the order appointing the referee.⁴⁴² The omission from the record of an adjournment does not give rise to a presumption of a loss of jurisdiction, where defendant subsequently attended the examination.⁴⁴³

— **Punishment for contempt.** It seems that there is no authority for the referee to himself punish the person to be examined for contempt in failing to attend to be examined or refusing to answer questions, but that he must report the facts to the judge granting the order or to whom it is returnable, or to the court.⁴⁴⁴

§ 2380. Duties of referee.

The duty of the referee is not to prosecute the inquisition but to take the evidence drawn out by the creditor's counsel.⁴⁴⁵

— **Report.** After the examination is concluded, it is the duty of the referee to make a report to the judge before whom the proceedings are returnable. If the order makes no provision as to the nature of the report, the referee must certify to the judge to whom the order is returnable all the evidence and the other proceedings taken before him.⁴⁴⁶ Where a special question is referred, pursuant to section 2443 of the Code, the referee may be directed to report either the evidence or the facts.⁴⁴⁷ In the latter case the referee should also certify the evidence.⁴⁴⁸ The report must also contain the oath of the referee, or the express waiver of it either in the form of a written waiver or of an entry in the minutes that such waiver was orally given.⁴⁴⁹ If the person to be examined fails to

⁴⁴² *Mason v. Lee*, 23 How. Pr. 466.

⁴⁴³ *Robertson v. Hay*, 12 Misc. 7, 66 State Rep. 530, 33 N. Y. Supp. 31.

⁴⁴⁴ Code Civ. Proc. § 2457.

⁴⁴⁵ *People v. Leipzig*, 52 How. Pr. 410.

⁴⁴⁶ Code Civ. Proc. § 2442.

⁴⁴⁷ Code Civ. Proc. § 2443.

⁴⁴⁸ Rule 30 of General Rules of Practice.

⁴⁴⁹ Code Civ. Proc. § 2445.

 Art. VIII. Examination.—B. Reference.—Duties of Referee.

attend before the referee, or refuses to answer a question, the referee should, on request, make a special report, setting forth the facts. A discontinuance should not be ordered before the report of the referee is made where the referee has heard all the evidence offered before him.⁴⁵⁰

— Form of report.

[Title of proceeding.]

To Hon. ———, a justice of the ——— court:

I, the undersigned, sole referee, appointed pursuant to an order of the Hon. ———, made in the above-entitled proceeding, dated the ——— day of ———, 190—, and hereto annexed, whereby it was referred to me to take and certify the examination in said proceedings, respectfully report as follows:

I. Before entering on said examination, I subscribed and took the oath required by section 2445 of the Code of Civil Procedure, which oath is annexed to and forms a part of this report [or if the oath was waived by the parties, so state and add "as appears by the stipulation hereto annexed"].

II. I have been attended by the parties to the action on which the above proceeding is based; and ——— who appeared as attorney in behalf of ———, and ——— who appeared as attorney in behalf of ———.

III. I have heard the proofs and allegations and taken the testimony of ———, the judgment debtor, and ———, and ———, which is hereto annexed, and which is all the evidence taken before me.

IV. I report that said depositions were, when completed, carefully read by me to the said ——— and ———, and were thereupon subscribed by them in my presence.

All of which is respectfully submitted.

[Date.]

[Signature.]

Examinations and testimony of ———, and ———, taken pursuant to the order of Hon. ———, judge of the ——— court, dated the ——— day of ———, 190—, a copy of which order is hereto annexed, by ———, referee, at ———, on the ——— day of ———, 190—, at ——— o'clock in the ——— noon.

[Date.]

Present, ——— for ———; ——— for ———.

Said ——— having been first duly sworn by said referee, testified as follows on his direct examination: [insert direct testimony].

And on his cross-examination by ———, attorney for ———, said

⁴⁵⁰ Kennedy v. Norcott, 54 How. Pr. 87.

—— further testified as follows: [insert testimony brought out on cross-examination which should be followed by signature of witness].

[In like manner insert the testimony of other witnesses. If there was an adjournment, so state and show the date on which the adjourned hearing took place.]

§ 2381. Subscription of testimony.

Where the examination is concluded, all that the party examined has a right to do is to add such explanatory statements as he, or his counsel, may deem necessary to prevent any misapprehension of what he has already said.⁴⁵¹ If taken down incorrectly, the witness should be allowed to change it before being required to sign his testimony.⁴⁵² The court will not compel the witness to sign his deposition where by so doing he might subject himself to legal liability not otherwise existing.⁴⁵³

§ 2382. Substitution of referee.

A new referee may be substituted by the judge before whom the order is made returnable.⁴⁵⁴

§ 2383. Effect of absence of referee.

The absence of the referee at the time appointed for examination does not, ipso facto, terminate the proceedings.⁴⁵⁵

§ 2384. Waiver by appearance.

Appearance before a referee, and submitting to an examination without objection, is a waiver of any irregularity.⁴⁵⁶

⁴⁵¹ *Corning v. Tooker*, 5 How. Pr. 16.

⁴⁵² *Sherwood v. Dolen*, 14 Hun, 191.

⁴⁵³ *Marx v. Spaulding*, 43 Hun, 365, 6 State Rep. 530.

⁴⁵⁴ *Pardee v. Tildon*, 83 N. Y. 623. General rules as to removal of referees, see ante, § 1869.

⁴⁵⁵ *Keihen v. Shipherd*, 16 Civ. Proc. R. (Browne) 183, 24 State Rep. 739, 4 N. Y. Supp. 339; *Allen v. Starring*, 26 How. Pr. 57.

⁴⁵⁶ *Bingham v. Disbrow*, 37 Barb. 24; *Rouse v. Goodman*, 8 Misc. 691, 28 N. Y. Supp. 524; *Robertson v. Hay*, 12 Misc. 7, 33 N. Y. Supp. 31.

(C) GENERAL RULES RELATING TO THE EXAMINATION.

§ 2385. Who may be examined.

The persons who may be examined on the hearing may be roughly grouped as (1) the judgment creditor, (2) the judgment debtor, (3) persons indebted to, or in possession of property of, the judgment debtor, and (4) other persons competent to testify as witnesses. The Code provides that "either party may be examined as a witness in his own behalf and may produce and examine other witnesses, as on the trial of an action."⁴⁵⁷ And also that "a corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer."⁴⁵⁸ Neglect to adjourn or extend the proceedings after the examination of the debtor has been concluded precludes the right to subsequently compel a witness to appear and testify.⁴⁵⁹

§ 2386. Who must be examined.

A judgment debtor himself need not be examined.⁴⁶⁰ The creditor may either examine the judgment debtor alone, or the debtor and witnesses, or merely witnesses.

§ 2387. Subpoena.

The method of compelling the attendance of a witness is by a subpoena. The subpoena is served as in an action, and a witness may insist on payment of his fees as a condition to his attendance.⁴⁶¹ A witness cannot be subpoenaed until service of the order for examination or the voluntary appearance of the person to be examined.⁴⁶² A witness may be required to appear by subpoena in a county other than the one in which he resides.⁴⁶³ The right to compel the assignee of a judgment

⁴⁵⁷, ⁴⁵⁸ Code Civ. Proc. § 2444.

⁴⁵⁹ *Thomas v. Kircher*, 15 Abb. Pr. (N. S.) 342.

⁴⁶⁰ *Graves v. Lake*, 12 How. Pr. 33.

⁴⁶¹ *Davis v. Turner*, 4 How. Pr. 190.

⁴⁶² *People v. Warner*, 51 Hun, 53, 20 State Rep. 573, 3 N. Y. Supp. 768.

⁴⁶³ *Foster v. Wilkinson*, 37 Hun, 242.

debtor to appear as a witness and produce books is not precluded by the fact that the judgment creditor has elected to bring an action to have the assignment set aside.⁴⁶⁴ Where a witness appears without being subpoenaed, he is bound to answer proper questions just the same as if he had been subpoenaed.⁴⁶⁵

§ 2388. Oath.

The examination of a party or witness must be under oath.⁴⁶⁶

§ 2389. Scope of examination.

It is impossible to lay down any particular rules which shall be universally applicable, farther than that the whole examination must be, for its single object, to ascertain whether there is any property of the debtor which ought to be applied to the payment of the judgment creditor's claim; and the extent of the inquiry, in each particular case, must be left to the good sense of the officer under whose direction it takes place, having in view this object.⁴⁶⁷ That a "fishing" examination is proper is undoubted since if the rule were otherwise the proceedings would be of very little practical benefit. The Code provides that the judgment debtor must "attend and be examined concerning his property,"⁴⁶⁸ and that a third person indebted to, or having possession of, property of the judgment debtor, must "attend and be examined concerning the debt or other property."⁴⁶⁹ No question which does not tend to discover the debtor's property is relevant or proper.⁴⁷⁰ and this is true regardless of who is the person being examined.

If the judgment debtor is examined, the examination should

⁴⁶⁴ Matter of Sickie, 52 Hun, 527, 23 State Rep. 585, 17 Civ. Proc. R. (Browne) 138, 5 N. Y. Supp. 703.

⁴⁶⁵ People v. Marston, 18 Abb. Pr. 257.

⁴⁶⁶ Code Civ. Proc. § 2444.

⁴⁶⁷ Leroy v. Halsey, 8 Super. Ct. (1 Duer) 589, 591.

⁴⁶⁸ Code Civ. Proc. §§ 2435, 2436.

⁴⁶⁹ Code Civ. Proc. § 2441.

⁴⁷⁰ Corning v. Tooker, 5 How. Pr. 16.

be the same as that of any other witness.⁴⁷¹ The judgment debtor cannot escape further examination by stating that he has no property. If he is in possession of any property, he may be asked when, where, and how he obtained possession, and on what terms he holds it. If he is not in possession of any property, he may be asked whether he had any or was interested in any a short time previous to the judgment, and what has become of it, and if he answers that he has sold it absolutely he may be asked what were the conditions of the sale, and what has become of the proceeds. If there is any doubt as to the bona fides of the transfer, the examination may be thorough on that point.⁴⁷² The examination of a debtor who has made an assignment for the benefit of creditors, before service of the order for examination, should not be limited to property acquired since the assignment.⁴⁷³ The good faith of a transfer of property may be inquired into,⁴⁷⁴ notwithstanding the fact that the examination may show that the debtor had been guilty of a crime.⁴⁷⁵ The debtor may be examined as to moneys lost in gambling and be required to give the name of the winner.⁴⁷⁶ The debtor cannot, however, be required to answer questions not tending to show whether he is in possession of or entitled to property which might be ordered to be applied towards the satisfaction of the judg-

⁴⁷¹ *Leroy v. Halsey*, 8 Super. Ct. (1 Duer) 589, 11 N. Y. Leg. Obs. 252, Code R. (N. S.) 275.

⁴⁷² *Sandford v. Carr*, 2 Abb. Pr. 462; *Leroy v. Halsey*, supra.

⁴⁷³ *Seligman v. Wallach*, 16 Abb. N. C. 317, 6 Civ. Proc. R. (Browne) 232, 67 How. Pr. 514; *Schneider v. Altman*, 16 Abb. N. C. 312. Rule is otherwise where examining creditor has recognized assignment by proving his claim. *Wilson Bros. Woodenware & Toy Co. v. Daggett*, 9 Civ. Proc. R. (Browne) 408. So rule is different where action has been brought to set aside the assignment. *Bacon v. Goldsmith*, 1 City Ct. R. 462; *Schloss v. Wallach*, 16 Abb. N. C. 319, note.

⁴⁷⁴ *Lathrop v. Clapp*, 40 N. Y. 328; *Matter of Sickie*, 52 Hun, 527, 23 State Rep. 585, 17 Civ. Proc. R. (Browne) 138, 5 N. Y. Supp. 703; *Matter of Sickie*, 52 Hun, 527, 5 N. Y. Supp. 703; *Millar v. Weaver*, 23 Misc. 254, 53 N. Y. Supp. 259.

⁴⁷⁵ *Forbes v. Willard*, 37 How. Pr. 193, 54 Barb. 520.

⁴⁷⁶ *Steinhart v. Farrell*, 3 State Rep. 292.

ment.⁴⁷⁷ Thus, it is not competent to inquire whether the amount of a trust affords a surplus applicable, unless there is an accumulation in hands of the trustees.⁴⁷⁸

The examination of a third person should be conducted in the same manner as that of the judgment debtor.⁴⁷⁹ It has been held, however, that if a "third person" deny that he is indebted to defendant and that he has any property belonging to him, the power of the court, so far as he is concerned, is at an end, except to forbid, by order, a transfer or disposition of such property or interest until the receiver has proceeded against him.⁴⁸⁰

The Code provision that either party may examine witnesses in his behalf authorizes a thorough examination of such witnesses as to any property of the defendant, and the witness is not excused from answering because he sets up a claim to the property which is the subject of the examination.⁴⁸¹ He may be examined to show that the purchase was not made in good faith.⁴⁸² If the witness is indebted to the judgment debtor, he may be asked questions to show that he holds the proceeds of collateral security in excess of his debt.⁴⁸³ Such a witness is not entitled to counsel as a matter of right.⁴⁸⁴

—**Incriminating questions.** A party or a witness, when examined, "is not excused from answering a question, on the ground that his examination will tend to convict him of the commission of a fraud; or to prove that he has been a party to, or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property, for any purpose; or that he or another person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the special proceeding, to hold property, derived from or

⁴⁷⁷ *Van Wyck v. Bradley*, 3 Code R. 157; *Hunt v. Enoch*, 6 Abb. Pr. 212.

⁴⁷⁸ *Campbell v. Foster*, 35 N. Y. 361.

⁴⁷⁹ *Corning v. Tooker*, 5 How. Pr. 16.

⁴⁸⁰ *Tompkins County Bank v. Trapp*, 21 How. Pr. 17.

⁴⁸¹ *Sandford v. Carr*, 2 Abb. Pr. 462.

⁴⁸² *Mechanics' & Traders' Bank v. Healy*, 14 Wkly. Dig. 120.

⁴⁸³ *Marx v. Spaulding*, 43 Hun, 365, 6 State Rep. 530.

⁴⁸⁴ *Schwab v. Cohen*, 13 State Rep. 709.

through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used, as evidence against the person so answering, in a criminal action, or criminal proceeding.⁴⁸⁵ Before the amendment of 1881 the Code provided that the examination should not be used as evidence against the party examined in criminal or civil proceedings. The amendment struck out the word "civil."⁴⁸⁶

§ 2390. Mode of examining.

Leading questions are allowable.⁴⁸⁷ Since the amendment of the old Code, and under the present Code, the debtor may be cross-examined in his own behalf on the subject-matter of the direct examination.⁴⁸⁸

— **Commission to take testimony out of state.** Formerly, a commission to take testimony out of the state could not be issued in supplementary proceedings.⁴⁸⁹ but the statute has been amended and now such a commission may be issued in supplementary proceedings.⁴⁹⁰

§ 2391. Reopening examination.

The examination may be reopened even after a receiver has been appointed,⁴⁹¹ but only on a special order for that purpose.⁴⁹²

⁴⁸⁵ Code Civ. Proc. § 2460. Answer in supplementary proceedings cannot be used as basis to impeach the witness in a criminal prosecution. *Loomis v. People*, 19 Hun, 601. Cannot be used in criminal prosecution. *Barber v. People*, 17 Hun, 366, 368. Can be used in civil proceedings. *Wright v. Nostrand*, 94 N. Y. 31, 41; *Kain v. Larkin*, 4 App. Div. 209, 38 N. Y. Supp. 546.

⁴⁸⁶ *Dusenbury v. Dusenbury*, 63 How. Pr. 349.

⁴⁸⁷ *Corning v. Tooker*, 5 How. Pr. 16.

⁴⁸⁸ *Leroy v. Halsey*, 8 Super. Ct. (1 Duer) 589, 591; overruling *Cornin v. Tooker*, 5 How. Pr. 16.

⁴⁸⁹ *Champlin v. Stodart*, 64 How. Pr. 378.

⁴⁹⁰ *Fiske v. Twigg*, 50 Super. Ct. (18 J. & S.) 69, 5 Civ. Proc. R. (Browne) 41.

⁴⁹¹ *Leggett v. Sloan*, 24 How. Pr. 479.

⁴⁹² *Orr's Case*, 2 Abb. Pr. 457.

§ 2392. Filing examination.

The examination must be filed with the county clerk in the county in which the examination is had.⁴⁹³ The examination is a record of the court, in which the judgment debtor has sufficient interest to require the judgment creditor to file it for future use or reference.⁴⁹⁴ Examinations should be filed even though incomplete when their filing is demanded.⁴⁹⁵

ART. IX. ORDER FOR PAYMENT OR DELIVERY OF PROPERTY.

§ 2393. Consideration of Code provisions.

Property is reached by supplementary proceedings either (1) by a permissive order granted a third person, or (2) by a compulsory order to deliver or pay over, or (3) through a receiver. Sections 2446 and 2447 of the Code provide a method for the payment of money or delivery of property to the sheriff or the receiver for the benefit of the person instituting the supplementary proceedings. The principal difference between the two provisions is that section 2446, which permits a person indebted to the judgment debtor to pay the debt to a sheriff so as to discharge the indebtedness, is merely permissive, and applies only to an indebtedness;⁴⁹⁶ while, on the other hand, the succeeding section, i. e., 2447, applies only to money or other personal property in the hands of the judgment debtor and "articles of personal property which are capable of delivery" in the possession or under the control of another person.⁴⁹⁷ The one applies wholly to third persons while the other applies both to a judgment debtor and to third persons.

⁴⁹³ Section 825 of the Code is applicable. *People v. McGoldrick*, 24 Civ. Proc. R. (Scott) 292, 33 N. Y. Supp. 441.

⁴⁹⁴ *Renner v. Meyer*, 22 Abb. N. C. 438, 6 N. Y. Supp. 535.

⁴⁹⁵ *Falkenberg v. Frank*, 20 Misc. 692, 46 N. Y. Supp. 675; *Falkenberg v. Frank*, 19 Misc. 418, 77 State Rep. 1137, 43 N. Y. Supp. 1137.

⁴⁹⁶ *Grand Lodge Knights of Pythias v. Manhattan Sav. Inst.*, 12 Misc. 626, 34 N. Y. Supp. 253.

⁴⁹⁷ Section 2447 does not apply to a mere debt. *Earle v. Quinn*, N. Y. Daily Reg., Dec. 11, 1880.

§ 2394. Order "permitting" third person to pay sheriff.

Section 2446 authorizes an order permitting the person or corporation indebted to a judgment debtor, to pay to a sheriff, designated in the order, a sum, on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution.⁴⁹⁸ This Code section is merely permissive,⁴⁹⁹ applies only to third persons, and the granting thereof is discretionary.

— **Who may make.** The order may be made by the judge by whom the order for examination or warrant of arrest was granted, or to whom it was returnable.⁵⁰⁰

— **Time when order may be made.** The order may be made at any time after the commencement of supplementary proceedings, and before the appointment of a receiver therein, or the extension of a receivership thereto.⁵⁰¹

— **Motion papers.** Proof by affidavit, to the satisfaction of the judge, must be made that a person or corporation is indebted to the judgment debtor.⁵⁰²

— **Form of affidavit.**

[Title of proceeding and venue.]

A. X., being duly sworn, says:

I. That he is ———.

II. That said supplementary proceeding was commenced before Hon. ———, judge of the ——— court, at ———, on the ——— day of ———, 190—, who, on the ——— day of ———, 190—, granted an order for the examination [or warrant for the arrest] of ———, requiring him to ———.

III. That no receiver has been appointed therein and no receivership has been extended thereto.

IV. That ———, of ———, is indebted to ———, the judgment debtor herein, in the sum of ——— dollars, for [state how indebtedness was created].

V. That no previous application has been made for this order.

[Jurat.]

[Signature.]

⁴⁹⁸ Code Civ. Proc. § 2446; *Burnett v. Riker*, 13 Civ. Proc. R. (Browne) 338.

⁴⁹⁹ *Grand Lodge Knights of Pythias v. Manhattan Sav. Inst.*, 12 Misc. 626, 34 N. Y. Supp. 253.

⁵⁰⁰⁻⁵⁰⁴ Code Civ. Proc. § 2446.

Art. IX. Order For Payment or Delivery.

Form of order.

[Title of proceeding.]

It appearing to my satisfaction, in the above proceeding, by the affidavit of ———, that ——— of ——— is indebted to ———, the judgment debtor in this proceeding, in the sum of ——— dollars, and that no receiver has been appointed in this proceeding nor a receivership extended thereto and [if a fact] that notice has been given to ——— of this application, as ordered by me:

It is hereby ordered, on the motion of ———, attorney for ———, that said ——— be and is hereby permitted to pay to ———, sheriff of ——— county, the sum of ——— dollars on account of his indebtedness to ———.

[Date.]

Justice of ——— court.

—— **Notice of motion.** Notice is not necessary unless ordered by the judge who may require "such a notice, given to such persons, as he deems just."⁵⁰³ It would seem, however, to be the better practice to always, if possible, serve notice on the judgment debtor.

—— **Discretion of judge.** The granting of the order is discretionary.⁵⁰⁴

—— **Effect of payment.** A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.⁵⁰⁵ This Code provision renders obsolete decisions, rendered under the old Code, that any voluntary payment by a third person to the sheriff was at the risk of the person who made it. But payment over with knowledge of facts which were concealed by the third person at the time of his examination which would have shown title in another claimant does not protect the person making the payment.⁵⁰⁶

⁵⁰³ Code Civ. Proc. § 2446; *Kennedy v. Carrick*, 18 Misc. 38, 75 State Rep. 444, 40 N. Y. Supp. 1127; *Gibson v. Haggerty*, 37 N. Y. 555. See, also, *Schrauth v. Dry Dock Sav. Bank*, 8 Daly, 106; *Lynch v. Johnson*, 48 N. Y. 27, 33.

⁵⁰⁶ *Wright v. Cabot*, 89 N. Y. 570, 576.

§ 2395. Order "requiring" payment or delivery.

"Where it appears, from the examination or testimony, * * * that the judgment debtor has, in his possession or under his control, money or other personal property belonging to him, or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver."⁵⁰⁷ If property, either in the hands of the debtor or of a third person, can be reached immediately, the creditor is entitled to do so by an order made pursuant to this Code provision, without the delay and risk of procuring the appointment of a receiver and instituting a suit in his name. An order for the application of property does not extend to property not capable of manual delivery and is a remedy merely cumulative with the appointment of a receiver.⁵⁰⁸ An order for the delivery of property to a receiver, where in the hands of a debtor, is proper, though the debtor has made a general assignment, where the assignee has made no claim to the property though a considerable time has elapsed since the assignment.⁵⁰⁹ The facts must be clearly shown on the examination to warrant an order to pay over.⁵¹⁰ Where defendants are joint tort feasons, neither of them can compel the other to deliver up any property in his possession

⁵⁰⁷ Code Civ. Proc. § 2447.

⁵⁰⁸ *Bailey v. Lane*, 15 Abb. Pr. 373, note; *Corning v. Tooker*, 5 How. Pr. 16.

⁵⁰⁹ *Eastern Nat. Bank v. Hulshizer*, 2 State Rep. 115.

⁵¹⁰ *Peters v. Kerr*, 22 How. Pr. 3.

 Art. IX. Order For Payment or Delivery.—Order “Requiring.”

which was acquired by them both through their fraudulent and wrongful acts.⁵¹¹

— **Time.** While the power conferred by this Code section is largely discretionary, and may be exercised with or without notice, it is intended that it should be exercised only in view of what may be disclosed on the examination or testimony taken in the special proceeding.⁵¹²

— **Who may make.** The order must be made by the judge by whom the order for examination or order of arrest is made, or to whom it is returnable.⁵¹³ The order must be made by a judge and not by the court.⁵¹⁴

— **Notice.** The order may be granted without notice or on “such a notice, given to such persons,” as the judge deems just.⁵¹⁵ The order may be granted without notice to the judgment debtor,⁵¹⁶ but it is the better practice, however, to always give notice to the judgment debtor before the order is made against a third person.⁵¹⁷

— **Contents of order.** The order must be definite and specifically set forth the act to be performed, by describing the property to be delivered. Thus, an order directing the delivery of personal property without specifying the amount is too indefinite.⁵¹⁸ An order directing the delivery of a certain number of cigars requires the debtor to deliver the boxes containing them.⁵¹⁹ The order must be reasonable. There is no power to compel the judgment debtor to transport wagons, hay, grain, etc., to a receiver in a city where the property is

⁵¹¹ *Bauer v. Betz*, 4 State Rep. 92.

⁵¹² *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

⁵¹³ Code Civ. Proc. § 2447.

⁵¹⁴ *Fiss v. Haag*, 75 App. Div. 241, 78 N. Y. Supp. 1. See, also, *Schenck v. Erwin*, 63 Hun, 104, 17 N. Y. Supp. 616.

⁵¹⁵ Code Civ. Proc. § 2447; *Lynch v. Johnson*, 46 Barb. 56.

⁵¹⁶ It would seem, however, that notice should be given where other persons are interested in, or make a claim to, the property specified in the order. *Serven v. Lowerre*, 3 Misc. 113, 23 N. Y. Supp. 1052.

⁵¹⁷ *Gibson v. Haggerty*, 37 N. Y. 555, 557.

⁵¹⁸ *Smith v. McQuade*, 59 Hun, 374, 36 State Rep. 556, 13 N. Y. Supp.

62.

⁵¹⁹ *Richie v. Bedell*, 22 Wkly. Dig. 563.

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outside of the city.⁵²⁰ So a debtor cannot be compelled to go to a sister state to get certain moneys due him as wages.⁵²¹ A judgment debtor should not be directed to make an assignment which, by the terms of his contract with others, it is impossible for him to make without violation to, or impairment of, the contractual rights of those other persons.⁵²² The order may be in the alternative that defendant pay over or that an attachment issue.⁵²³ The order must require payment or delivery to a sheriff or to a receiver.⁵²⁴ Property discovered cannot be ordered to be delivered to the creditor on his giving the debtor a receipt for the claim.⁵²⁵ An order directing third persons to pay over moneys to the sheriff is irregular, where the fact that a receiver of the judgment debtor's property had been previously appointed, was concealed, although the consent of the judgment debtor to such payment was obtained before the order was made.⁵²⁶

— Form of order.

[Title of proceeding.]

It having appeared by the examination and testimony taken in the above-entitled proceeding, that ——— [the judgment debtor herein], has, in his possession [or "under his control"], and belonging to him, money [or "personal property, to-wit"] [and due notice of this application having been given to ———, as required by me]:

Now, on motion of ———, attorney for ———, I do hereby order that said ———, the judgment debtor herein, immediately pay [or "deliver"] to ———, the sheriff of ——— county [or, if receiver has been appointed, "to ———, the receiver of the property of said judgment debtor, appointed in this proceeding on the ——— day of ———, 190—, by an order granted by ———"] the sum of ——— dollars [or, if articles of

⁵²⁰ *Smith v. McQuade*, 59 Hun, 374, 36 State Rep. 556, 13 N. Y. Supp. 62.

⁵²¹ *Buchanan v. Hunt*, 98 N. Y. 560.

⁵²² *Columbian Inst. v. Cregan*, 11 Civ. Proc. R. (Browne) 87; *Dease v. Reese*, 39 Misc. 657, 660, 80 N. Y. Supp. 590.

⁵²³ *Crouse v. Wheeler*, 33 How. Pr. 337.

⁵²⁴ *Gray v. Ashley*, 24 Misc. 396, 53 N. Y. Supp. 547; *Boelger v. Swivel*, 1 How. Pr. (N. S.) 372.

⁵²⁵ *Dickinson v. Onderdonk*, 18 Hun, 479.

⁵²⁶ *Columbia Bank v. Ingersoll*, 21 Abb. N. C. 241, 1 N. Y. Supp. 54.

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personal property other than money are to be delivered, name them so as to be capable of identification].

[Date.]

[Signature.]

— **Property which may be reached.** Subject to the rules already laid down,⁵²⁷ as to what property may be reached by supplementary proceedings, the order based on the Code provision now being considered may require (a) the payment or delivery by the judgment debtor of money or other personal property belonging to him and in his possession or under his control, or (b) the delivery of one or more articles of personal property in the possession or under the control of a third person, capable of delivery, the debtor's right to the possession whereof is not substantially disputed. It will be noticed that the judgment debtor can be ordered to deliver possession only of "money or other personal property" and hence he cannot be ordered to deliver the possession of real property,⁵²⁸ though the rule was otherwise under the old Code. "Money" cannot be reached by this order unless it is in the hands of the judgment debtor, i. e., it cannot be reached in the hands of a third person,⁵²⁹ except perhaps where it has not lost its identity, i. e., where specific funds still remain in the possession or under the control of the third person.⁵³⁰ Furthermore, the weight of authority is that money, such as earnings, not due or payable at the time the order is served, cannot be reached,⁵³¹ though the contrary has been held.⁵³² The judge cannot order a portion of the debtor's

⁵²⁷ See ante, § 2332.

⁵²⁸ *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 571, 18 State Rep. 414, 15 Civ. Proc. R. (Browne) 324, 2 N. Y. Supp. 315. But see *Matter of Crane*, 81 Hun, 96, 30 N. Y. Supp. 616, where it was held that the court had power to direct the transfer, inter alia, of a land contract.

⁵²⁹ *Grand Lodge Knights of Pythias v. Manhattan Sav. Inst.*, 12 Misc. 626, 34 N. Y. Supp. 253.

⁵³⁰ *Broderick v. Archibald*, 61 App. Div. 473, 70 N. Y. Supp. 617.

⁵³¹ *Albright v. Kempton*, 4 Civ. Proc. R. (Browne) 16; *Kroner v. Reilly*, 49 App. Div. 41, 63 N. Y. Supp. 527; *Merriam v. Hill*, 1 Wkly. Dig. 260; *Columbian Inst. v. Cregan*, 3 State Rep. 287.

⁵³² *Thompson v. Nixon*, 3 Edw. Ch. 457.

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future salary to be applied on the judgment;⁵³³ though since the amendment of 1903 to section 1391 of the Code,⁵³⁴ a percentage of such future earnings may be reached in certain cases by means of an execution. Moneys to become due on a contingency or on an executory contract,⁵³⁵ such as wages,⁵³⁶ cannot be reached by the service of an order on a third person. The fact that a third person has in his hands a mortgage from which he would at some future time have the means to pay the judgment debtor a legacy left him is not sufficient to justify the order to pay over.⁵³⁷ If property is assigned by the judgment debtor before the service of a third person order for examination, the judge cannot direct a delivery over of such property.⁵³⁸ So the order cannot require the debtor to apply properties acquired by him after service of the order for examination but which he has already disposed of.⁵³⁹ The judge cannot order the debtor to deliver to the receiver property covered by a chattel mortgage,⁵⁴⁰ though the mortgage is past due.⁵⁴¹ For instance, a judgment debtor will not be required to assign a liquor license which he has already mortgaged.⁵⁴² The order can only require the property or money of the judgment debtor to be applied.⁵⁴³ Account books of a physician cannot be ordered to be delivered, where they contain private information as to his patients,⁵⁴⁴ nor can a liquor license already assigned for a good consideration.⁵⁴⁵

⁵³³ *Columbian Inst. v. Cregan*, 3 State Rep. 287.

⁵³⁴ See ante, § 2231.

⁵³⁵ *McCormick v. Kehoe*, 7 N. Y. Leg. Obs. 184.

⁵³⁶ *First Nat. Bank of Auburn v. Beardsley*, 8 Wkly. Dig. 7.

⁵³⁷ *Schenck v. Erwin*, 63 Hun, 104, 106, 43 State Rep. 862, 17 N. Y. Supp. 616.

⁵³⁸ *Hexter v. Pennsylvania R. Co.*, 43 App. Div. 113, 59 N. Y. Supp. 453.

⁵³⁹ *Caton v. Southwell*, 13 Barb. 335. To same effect, *Dease v. Reese*, 39 Misc. 657, 80 N. Y. Supp. 590.

⁵⁴⁰ *Griswold v. Tompkins*, 7 Daly, 214.

⁵⁴¹ *Tinkey v. Langdon*, 13 Wkly. Dig. 384.

⁵⁴² *David Mayer Brewing Co. v. Rizzo*, 13 Misc. 336, 68 State Rep. 361, 34 N. Y. Supp. 457.

⁵⁴³ *Cooman v. Board of Education of Rochester*, 37 Hun, 96.

⁵⁴⁴ *Kelly v. Levy*, 29 State Rep. 659, 8 N. Y. Supp. 849.

Art. IX. Order For Payment or Delivery.—Order "Requiring."

Where there exists a substantial dispute as to the judgment debtor's right to possession, an order should not be made requiring a delivery over.⁵⁴⁶ In such case the judgment creditor must be left to the appointment of a receiver of the property of the judgment debtor and an action by him against the third person.⁵⁴⁷ But a claimant is estopped from questioning the power of the court to determine a disputed claim of title by her petition to determine the ownership and by her litigating the question at the hearing thereof.⁵⁴⁸ The question then arises as to when the debtor's right to possession is "substantially disputed."⁵⁴⁹ It would seem that the

⁵⁴⁵ David Mayer Brewing Co. v. Rizzo, 13 Misc. 336, 68 State Rep. 361, 34 N. Y. Supp. 457.

⁵⁴⁶ Krone v. Klotz, 3 App. Div. 587, 73 State Rep. 719, 25 Civ. Proc. R. (Scott) 320, 3 Ann. Cas. 36, 38 N. Y. Supp. 225; Frost v. Craig, 18 Civ. Proc. R. (Browne) 296, 30 State Rep. 848, 9 N. Y. Supp. 528, 16 Daly, 107; Fromme v. Jarecky, 19 Misc. 483, 43 N. Y. Supp. 1081; Grassmuck v. Richards, 2 Abb. N. C. 359; Brein v. Light, 36 Misc. 110, 72 N. Y. Supp. 655; Gallagher v. O'Neil, 21 State Rep. 161, 3 N. Y. Supp. 126.

⁵⁴⁷ West Side Bank v. Pugsley, 12 Abb. Pr. (N. S.) 28; Goodyear v. Betts, 7 How. Pr. 187; Rodman v. Henry, 17 N. Y. 482.

⁵⁴⁸ Gomprecht v. Scott, 27 Misc. 192, 57 N. Y. Supp. 799.

⁵⁴⁹ The right to possession is "substantially disputed" where moneys are claimed under an alleged prior lien. Moller v. Wells, 29 Hun, 587. So the right of judgment debtors to surplus moneys in the hands of a county treasurer arising on a sale of their land for taxes, is "substantially disputed," when such surplus is claimed by mortgagees of the lands whose mortgages were prior to the examining creditor's judgment. Miller v. Lyons, 17 Wkly. Dig. 86. So an order will not be granted where the title to a check deposited is in dispute as between the judgment debtor and the claimant. Nathans v. Satterlee, 18 Abb. N. C. 310. So the question of the validity of a transfer, by defendant, of a fund which the assignee claimed under a prior assignment, cannot be determined in supplementary proceedings but only in an action brought by the receiver for such purpose. Stearns v. Eaton, 43 State Rep. 518, 17 N. Y. Supp. 687. So if another claimant has sued a third person to recover the debt as his own and the judgment debtor denies that the money belongs to him, the judge has no authority to summarily decide the question and direct payment to the sheriff. Waldron v. Walker, 43 State Rep. 605, 18 N. Y. Supp. 292. An order for delivery should not be made where there is a question of whether the property

term "substantial dispute" means a bona fide controversy as distinguished from a mere colorable dispute.⁵⁵⁰ It is immaterial that the claim of the third person is based on a fraudulent transfer.⁵⁵¹ But if the evidence shows beyond a reasonable doubt that the adverse claim is unfounded, the order may issue.⁵⁵² It would seem that if the property is claimed as exempt, the order cannot be made.⁵⁵³

§ 2396. Duties of sheriff receiving property.

If the sheriff, to whom money is paid, or other property is delivered, pursuant to an order made as prescribed in either section 2446 or 2447 of the Code, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property, as if the money had been collected, or the property had been levied upon by him, by virtue of such an execution; except as otherwise prescribed in the next paragraph.⁵⁵⁴

After a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order, direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver; or if the case so requires, to deliver to the receiver the property in his hands. But if it appears, to the satisfaction of the judge, that an order, appointing a receiver or extending a receivership is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered upon an execution in favor of

belongs to the judgment debtor or to his wife. *Serven v. Lowerre*, 3 Misc. 113, 23 N. Y. Supp. 1052.

⁵⁵⁰ *Lilienthal v. Wallach*, 37 Fed. 241.

⁵⁵¹ *Town v. Safeguard Ins. Co.*, 17 Super. Ct. (4 Bosw.) 683.

⁵⁵² *Hall v. McMahon*, 10 Abb. Pr. 103.

⁵⁵³ *Dickinson v. Onderdonk*, 18 Hun. 479.

⁵⁵⁴ Code Civ. Proc. § 2448. This section does not authorize a sheriff who receives money on one execution to apply it on another execution in his hands. *Adams v. Welsh*, 43 Super. Ct. (11 J. & S.) 52.

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the judgment creditor, issued either before or after the payment or delivery to the sheriff.⁵⁵⁵

Where money is paid, or property is delivered, and afterwards the special proceeding is discontinued or dismissed, or the judgment is satisfied without resorting to that money or property, or a balance of the money or of the proceeds of the property, or a part of the property, remains in the sheriff's or the receiver's hands, after satisfying the judgment and the costs and expenses of the special proceedings, the judge must make an order, directing the sheriff or receiver to pay the money or deliver the property so remaining in his hands to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees, and all other sums legally chargeable against the same.⁵⁵⁶

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§ 2397. Who may punish.

A contempt may be punished "by the judge or by the court out of which the execution was issued."⁵⁵⁷ This means the judge before whom the proceeding was initiated or the court, at special term, out of which the execution was issued.⁵⁵⁸

§ 2398. What constitutes.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee made in supplementary proceedings, and duly served upon him, or an oral direction given directly to him by a judge or referee in the course of the special proceeding, or to attend before a judge or referee according to the command of a subpoena duly served upon him, may be punished as for a contempt.⁵⁵⁹ In a proceeding

⁵⁵⁵ Code Civ. Proc. § 2449.

⁵⁵⁶ Code Civ. Proc. § 2450.

⁵⁵⁷ Code Civ. Proc. § 2457. Punishment may be ordered by judge, out of court, where he made the order disobeyed. *Lathrop v. Clapp*, 40 N. Y. 328. Special term presided over by another justice may punish. *People v. Kelly*, 22 How. Pr. 309.

⁵⁵⁸ *Blanchard v. Reilly*, 11 Civ. Proc. R. (Browne) 278.

⁵⁵⁹ Code Civ. Proc. § 2457.

volume the general Code rules as to what constitutes a contempt have been considered,⁵⁶⁰ and such rules apply to contempt in supplementary proceedings.⁵⁶¹

—**Failure to appear.** The failure or refusal to obey an order to appear to be examined, or to attend before a judge or referee according to the command of a subpoena duly served, constitutes a contempt. So a failure of the judgment debtor to appear on the day to which the examination had been adjourned is a contempt,⁵⁶² and it is immaterial that the order for examination might have been successfully opposed on the ground that the property was subject to levy and sale on execution.⁵⁶³ Failure to appear on an adjourned day is a contempt though the adjournment was made in the absence of the party, on the consent of his attorney.⁵⁶⁴ But the failure of a creditor to appear on an adjourned day does not preclude his commencing a new proceeding or obtaining an order to continue the proceedings already commenced.⁵⁶⁵ It has been held not necessary to show that the refusal to appear and be examined was calculated to, or did defeat, impair, impede, or prejudice the rights or remedies of a party,⁵⁶⁶ but it seems that the later cases are to the contrary.⁵⁶⁷

—**Failure to produce books.** A person ordered to produce books in supplementary proceedings may be fined for contempt where he gives no good reason for his refusal to produce some of the books.⁵⁶⁸

⁵⁶⁰ Volume 1, §§ 378-389.

⁵⁶¹ See *Wolf v. Buttner*, 6 Misc. 119, 26 N. Y. Supp. 52; *Matter of Ryan*, 73 App. Div. 137, 77 N. Y. Supp. 132.

⁵⁶² *Kreiser v. Kitaoka*, 36 Misc. 174, 73 N. Y. Supp. 164; *Ammidon v. Wolcott*, 15 Abb. Pr. 314.

⁵⁶³ *Kreiser v. Kitaoka*, 36 Misc. 174, 73 N. Y. Supp. 164.

⁵⁶⁴ *Parker v. Hunt*, 15 Abb. Pr. 410, note.

⁵⁶⁵ *Schanck v. Conover*, 56 How. Pr. 437.

⁵⁶⁶ *Woods v. De Figanieri*, 24 Super. Ct. (1 Rob.) 607, 613, 16 Abb. Pr. 1. Form of order, see *New Jersey F. & M. Co. v. Siebert*, 45 Misc. 357.

⁵⁶⁷ *Matter of Ryan*, 73 App. Div. 137, 77 N. Y. Supp. 132; *Wolf v. Buttner*, 6 Misc. 119, 26 N. Y. Supp. 52.

⁵⁶⁸ *Friedman v. Newman*, 86 N. Y. Supp. 735; *Mitchell's Case*, 12 Abb. Pr. 249.

— **Refusal to testify.** Refusal of witnesses to be sworn or to testify is punishable as a contempt.⁵⁶⁹

— **Perjury.** A person examined cannot be punished for contempt for answering falsely.⁵⁷⁰

— **Violation of injunction order.** The most common ground of contempt proceedings is the violation of the order forbidding the disposal of, or interference with, the debtor's property. What acts constitute a violation of such an order have already been considered.⁵⁷¹ Title cannot be determined on a motion to punish for contempt in disposing of property in violation of an injunction order.⁵⁷² Where a judgment debtor has violated the order, but before any motion is made obtains a satisfaction of the judgment from the owner of the judgment, he cannot be punished for contempt notwithstanding that the attorney for the original judgment creditor had by agreement an interest to the extent of one-half in the judgment.⁵⁷³

— **Disobedience of order to deliver or pay over.** Failure or refusal to obey an order to pay over money, or deliver property, to a sheriff or the receiver, is punishable as a contempt,⁵⁷⁴ and this is so notwithstanding defendant denies an oath that he has any property,⁵⁷⁵ since the title to the money or other property will not be determined on the application to punish for contempt.⁵⁷⁶ But the refusal to surrender "possession" of property is not a contempt where the order required a "conveyance" but not delivery of possession of real property.⁵⁷⁷ And a judgment debtor or a third person cannot be punished for contempt in refusing to turn over prop-

⁵⁶⁹ *Howe v. Welch*, 11 Civ. Proc. R. (Browne) 444; *People v. Marston*, 18 Abb. Pr. 257; *Lathrop v. Clapp*, 40 N. Y. 328.

⁵⁷⁰ No order is disobeyed. *Matter of Ryan*, 73 App. Div. 137, 77 N. Y. Supp. 132; *Bernheimer v. Kelleher*, 31 Misc. 464, 64 N. Y. Supp. 409.

⁵⁷¹ See ante, § 2368.

⁵⁷² *Matter of Becker*, 36 Misc. 322, 73 N. Y. Supp. 577.

⁵⁷³ *Avery v. Ackart*, 20 Misc. 631, 46 N. Y. Supp. 1085.

⁵⁷⁴ *Brush v. Lee*, 1 Abb. Dec. 238, 6 Abb. Pr. (N. S.) 50.

⁵⁷⁵ *Matter of Pester*, 2 Code R. 98.

⁵⁷⁶ *Holmes v. O'Regan*, 68 App. Div. 318, 74 N. Y. Supp. 10.

⁵⁷⁷ *Tinkey v. Langdon*, 60 How. Pr. 180.

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erty to a receiver where there is no order for such delivery.⁵⁷⁸ So where it does not appear that at the time of the service of the order directing a delivery the judgment debtor had possession of the property, he should not be punished for contempt in failing to deliver it.⁵⁷⁹ Commitment for contempt is not proper unless the examination shows that specific property or a sum of money was, at the time of the service of the order for the debtor's examination, in his possession or under his control.⁵⁸⁰ It seems that a third person should not be committed for contempt for disobeying an order to pay over where the claim had been assigned, and a motion to vacate the order has been made and improperly denied.⁵⁸¹ The judgment debtor cannot be adjudged in contempt for disobeying an order to convey land within the state to his receiver, since the title vests by operation of law.⁵⁸² nor in refusing to obey an order that he deliver possession, since such an order is not proper in so far as real property is concerned.⁵⁸³ So the debtor cannot be punished for refusing to deliver exempt property.⁵⁸⁴ But failure to pay over moneys by the judgment debtor cannot be excused by the fact that other moneys are mingled in the deposit.⁵⁸⁵

§ 2399. Excuses and defenses.

The rules as to what constitutes a good excuse for disobey-

⁵⁷⁸ *Frommie v. Jarecky*, 19 Misc. 483, 43 N. Y. Supp. 1081; *Watson v. Fitzsimmons*, 12 Super. Ct. (5 Duer) 629, 631.

⁵⁷⁹ *Richie v. Bedell*, 22 Wkly. Dig. 563.

⁵⁸⁰ *Tinker v. Crooks*, 22 Hun, 579. In this case, defendant, without submitting to an examination, at once admitted the possession of property sufficient to satisfy the judgment and the order to pay over provided that he should be fined a specified sum on failure to pay as ordered.

⁵⁸¹ *Beebe v. Kenyon*, 3 Hun, 73, 5 T. & C. 271.

⁵⁸² *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 571, 18 State Rep. 414, 15 Civ. Proc. R. (Browne) 324, 2 N. Y. Supp. 315.

⁵⁸³ *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 571, 18 State Rep. 414, 15 Civ. Proc. R. (Browne) 324, 2 N. Y. Supp. 315.

⁵⁸⁴ *Fink v. Fraenkle*, 39 State Rep. 194, 20 Civ. Proc. R. (Browne) 402, 14 N. Y. Supp. 140.

⁵⁸⁵ *Matter of Weld*, 34 App. Div. 471, 54 N. Y. Supp. 253.

ing an order, as already set forth in a preceding volume,⁵⁸⁶ apply in this connection and will not be repeated. Of course, if the order is merely irregular, but not void, it must be obeyed until set aside.⁵⁸⁷ The following facts have been held to constitute a good defense: Want of jurisdiction in the court rendering the judgment;⁵⁸⁸ the existence of an undisposed of previous order for examination, in addition to the order for examination on which the contempt proceedings are based;⁵⁸⁹ the existence of a second order for examination where the contempt proceedings are based on the first order;⁵⁹⁰ the failure to state sources of information as to indebtedness or possession of property, in affidavit for examination of third person;⁵⁹¹ the fact that defendant was sued by a wrong name;⁵⁹² and the fact that the referee appointed was not eligible.⁵⁹³ On the other hand the following have been held no defense: Want of service of summons in the original action;⁵⁹⁴ irregular order for examination;⁵⁹⁵ hostility of the referee;⁵⁹⁶ irregularities in adjournment;⁵⁹⁷ falsity of the affidavit;⁵⁹⁸ insufficiency of the affidavit on which the order for examination was based, where not rendering the order void;⁵⁹⁹ discharge in

⁵⁸⁶ Volume 1, § 387.

⁵⁸⁷ Volume 1, p. 336.

⁵⁸⁸ *McGill v. Weill*, 19 Civ. Proc. R. (Browne) 43, 10 N. Y. Supp. 246.

⁵⁸⁹ *Brockway v. Brien*, 37 How. Pr. 270.

⁵⁹⁰ *Gaylord v. Jones*, 7 Hun, 480.

⁵⁹¹ *People v. Jones*, 1 Abb. N. C. 172.

⁵⁹² *Muldoon v. Pierz*, 1 Abb. N. C. 309.

⁵⁹³ *Gilbert v. Frothingham*, 13 Civ. Proc. R. (Browne) 288.

⁵⁹⁴ *Keller v. Zeigler*, 5 Month. Law Bul. 15.

⁵⁹⁵ *Shults v. Andrews*, 54 How. Pr. 378.

⁵⁹⁶ *Tremain v. Richardson*, 68 N. Y. 617.

⁵⁹⁷ *Parker v. Hunt*, 15 Abb. Pr. 410, note; *People v. Oliver*, 66 Barb. 570.

⁵⁹⁸ *Hilton v. Patterson*, 18 Abb. Pr. 245.

⁵⁹⁹ *Fleming v. Tourgee*, 40 State Rep. 705, 21 Civ. Proc. R. (Browne) 297, 16 N. Y. Supp. 2; *Matter of Hatfield*, 17 App. Div. 430, 79 State Rep. 270, 45 N. Y. Supp. 270; *Lehmaier v. Griswold*, 46 Super. Ct. (14 J. & S.) 11.

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insolvency, where such discharge is not produced on the day set for examination.⁶⁰⁰

§ 2400. Procedure.

An application to punish for contempt in supplementary proceedings is regulated by title 3 of chapter 17 of the Code.⁶⁰¹ It will be unnecessary in this connection to consider in detail questions relating to the procedure to obtain punishment for contempt, and the extent of the punishment which may be inflicted, since governed by the general rules applicable to practice in contempt proceedings which will be fully considered in a subsequent chapter. An affidavit proving the facts charged is necessary,⁶⁰² but not where the facts are within the judicial cognizance of the judge or court.⁶⁰³ The application to punish for contempt must be instituted and determined in the county in which supplementary proceedings are instituted and pending.⁶⁰⁴ An order granting a motion to punish for failure to appear to be examined, unless the debtor appears for examination on a specified future day, while not a final order, is appealable because it affects a substantial right.^{604a}

ART. XI. COSTS.

§ 2401. Allowance to judgment creditor.

The judge may make an order allowing to the judgment creditor a fixed sum, as costs, consisting of his witnesses' fees

⁶⁰⁰ *Coursen v. Dearborn*, 30 Super. Ct. (7 Rob.) 143.

⁶⁰¹ *Matter of Backus*, 91 App. Div. 266, 86 N. Y. Supp. 638, which held that an order to show cause why the judgment debtor should not be adjudged guilty of contempt in refusing to answer questions must be made in the judicial district embracing the county in which supplementary proceedings were instituted.

⁶⁰² *Rineland v. Dunham*, 2 Civ. Proc. R. (Browne) 32. Affidavit must affirmatively show breach of duty. *Gerregani v. Wheelwright*, 3 Abb. Pr. (N. S.) 264. Referee's report as evidence. *Newell v. Cutler*, 19 Hun, 74.

⁶⁰³ *Miller v. Adams*, 52 N. Y. 409.

⁶⁰⁴ *In re Backus*, 91 App. Div. 266, 86 N. Y. Supp. 638.

^{604a} *Rupert v. Lee*, 101 App. Div. 492, 92 N. Y. Supp. 75.

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and other disbursements, and of a sum, in addition thereto, not exceeding thirty dollars; and directing the payment thereof out of any money which has come, or may come, to the hands of the receiver, or of the sheriff, or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.⁶⁰⁵ The granting of the order is discretionary.⁶⁰⁶ For instance, where the creditor permits the proceeding to lie dormant and the judgment is collected by means of a second execution, he will not be awarded costs.⁶⁰⁷ Costs may be awarded against the judgment debtor though the proceedings are for the examination of a third person and not the debtor,⁶⁰⁸ and such costs may be ordered paid though an examination has not been had.⁶⁰⁹ The payment of the judgment under which supplementary proceedings are instituted, before the order appointing a receiver has been filed in the office of the clerk of the county in which the judgment roll was docketed, does not oust the court of jurisdiction to compel the payment of the costs and disbursements of the supplementary proceedings.⁶¹⁰ The item of a fixed sum not exceeding thirty dollars is in the nature of an "additional allowance" as that term is used in the Code chapter on Costs.⁶¹¹ Allowing thirty dollars "for counsel fee," instead of "as costs," is not fatal.⁶¹² The costs, if no express provision is made in regard thereto, are payable out of any money which has come into the hands of the receiver, or the order may direct that they be paid by the judgment debtor or "other person against whom the special proceeding is instituted."⁶¹³ The allowance is ordinarily taken

⁶⁰⁵ Code Civ. Proc. § 2455.

⁶⁰⁶ *Paterson v. Goorley*, 14 Misc. 56, 35 N. Y. Supp. 297.

⁶⁰⁷ *Ritter v. Greason*, 28 Misc. 656, 59 N. Y. Supp. 1053.

⁶⁰⁸ *Grinnel v. Sherman*, 19 Civ. Proc. R. (Browne) 139, 33 State Rep. 27, 11 N. Y. Supp. 682.

⁶⁰⁹ *Colne v. Girard*, 19 Abb. N. C. 288, where debtor paid amount due and proceedings were dismissed before an examination.

⁶¹⁰ *Holton v. Robinson*, 59 App. Div. 45, 69 N. Y. Supp. 33.

⁶¹¹ See *Hulsaver v. Wiles*, 11 How. Pr. 446, 448.

⁶¹² *Hulsaver v. Wiles*, 11 How. Pr. 446, 448.

⁶¹³ *Valiente v. Bryan*, 3 Civ. Proc. R. (Browne) 358.

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out of the proceeds of property discovered by the proceedings.⁶¹⁴ It seems that the person instituting the proceedings must make the application for the order,⁶¹⁵ but such application cannot be made until the proceeding has been brought to an end in favor of the party so applying.⁶¹⁶ It is customary to insert the order allowing costs in the order appointing a receiver. Such costs are a mere incident to the matter before the judge and cannot be separately collected by an execution.⁶¹⁷ So a receiver will not be appointed merely to collect the costs and disbursements of the attorney for the judgment creditor, where no costs have been awarded or allowed.⁶¹⁸

— Form of order.

[Title of proceeding.]

On the application of ———, attorney for ———, the judgment creditor herein, I do hereby order and allow to said ———, as costs in this proceeding, the sum of ——— dollars, consisting of ——— dollars disbursements, and ——— dollars allowed in addition thereto as costs, in this proceeding, and direct the same to be paid by the sheriff of ——— county [or “by ———, the receiver herein”] out of any moneys now in his hands or which may hereafter come into his hands.⁶¹⁹

[Date.]

_____,
Judge of ——— court.

§ 2402. Allowance to judgment debtor or third person.

Where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined, and property applicable to the payment of the judgment has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a fixed sum as costs, consisting of his witnesses' fees and other disbursements and,

⁶¹⁴ Matter of Thompson, 31 Misc. 802, 62 N. Y. Supp. 1033.

⁶¹⁵ Mere witness cannot apply. Davis v. Turner, 4 How. Pr. 190.

⁶¹⁶ Davis v. Turner, 4 How. Pr. 190, 195.

⁶¹⁷ Holton v. Robinson, 59 App. Div. 45, 51, 69 N. Y. Supp. 33; Valiente v. Bryan, 3 Civ. Proc. R. (Browne) 358.

⁶¹⁸ Paterson v. Goorley, 14 Misc. 56, 35 N. Y. Supp. 297.

⁶¹⁹ Order may direct payment by judgment debtor himself, within a specified time.

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in addition thereto, a sum not exceeding thirty dollars; and directing the payment thereof, within a time specified in the order, by the judgment creditor, or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.⁶²⁰ It will be observed that this Code provision, by necessary implication, provides for an allowance of costs to one examined under a third person order as well as to a judgment debtor.⁶²¹ Furthermore, it will be noticed that costs can be granted only where there has been an examination, and hence where the proceedings are dismissed without an examination, for a defect in the affidavit, costs cannot be allowed,⁶²² though the court may, in such a case, impose motion costs on the creditor since the limitation of the Code provision relates only to costs in the proceeding.⁶²³ Where the debtor is awarded costs it is common practice to direct that such costs be deducted from the judgment on which the proceedings are based.⁶²⁴

— Form of order.

[Title of proceeding.]

——, the [designate party examined], having been examined herein, and no property applicable to the payment of the judgment having been discovered thereby:

Now, on the application of ——, attorney for said ——, I do hereby order and allow to said —— the sum of —— dollars, as costs of these proceedings, together with his disbursements which are hereby taxed at —— dollars, and I do hereby direct the payment of said amount by ——, the judgment creditor, within —— days after the personal service on him of a certified copy of this order, and a demand thereof by said judgment debtor or his lawful agent or attorney.

[Date.]

Judge of —— court.

⁶²⁰ Code Civ. Proc. § 2456.

⁶²¹ Rule under old Code, see Anony., 11 Abb. Pr. 108.

⁶²² Simms v. Frier, 2 Month. Law Bul. 97.

⁶²³ Hutson v. Weld, 38 Hun, 142.

⁶²⁴ First Nat. Bank of Newville v. Yates, 21 Misc. 373, 47 N. Y. Supp. 484. But see Boelger v. Swivel, 1 How. Pr. (N. S.) 372.

§ 2403. Security for costs.

Plaintiff in the proceedings cannot be required to file security for costs.⁶²³

ART. XII. DISMISSAL OR DISCONTINUANCE OF PROCEEDINGS.

§ 2404. Dismissal.

Where the judgment creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed, on such terms as justice requires, by an order of the judge, made on the application of the judgment debtor, or of the plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted supplementary proceedings.⁶²⁶ The proceeding does not fall of its own weight for neglect to prosecute it.⁶²⁷ Thus, the neglect of the creditor to appear on an adjourned day does not terminate the proceedings,⁶²⁸ nor does an omission to cause the proceedings to be regularly adjourned,⁶²⁹ nor does the absence of the judge from his office at the time appointed for a hearing.⁶³⁰ So five months' delay in instituting contempt proceedings after refusal to answer questions does not, of itself, constitute an abandonment of the proceedings,⁶³¹ nor does a mere delay in the appointment of a receiver preclude an appointment.⁶³² A postponement of the examination to a day to be fixed on, without further action for several years,⁶³³ or the failure of the cred-

⁶²³ *First Nat. Bank of Newville v. Yates*, 21 Misc. 373, 47 N. Y. Supp. 484.

⁶²⁶ Code Civ. Proc. § 2454. This provision was not contained in the old Code so that decisions thereunder as to abandonment without an order of court do not apply.

⁶²⁷ *Rothschild v. Gould*, 84 App. Div. 196, 199, 82 N. Y. Supp. 558.

⁶²⁸ *Underwood v. Sutcliffe*, 10 Hun, 453.

⁶²⁹ *Wright v. Norstrand*, 94 N. Y. 31.

⁶³⁰ *Reynolds v. McElhone*, 20 How. Pr. 454.

⁶³¹ *Stanley v. Lovett*, 14 Hun, 412.

⁶³² *Barnett v. Moore*, 20 Misc. 518, 46 N. Y. Supp. 668.

⁶³³ *Meyers v. Herbert*, 64 Hun, 200, 45 State Rep. 626, 22 Civ. Proc. R. (Browne) 216, 19 N. Y. Supp. 132.

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itor to appear on an adjourned day,⁶³⁴ or the failure to do anything under the order for examination except to serve the order on a day subsequent to the time appointed for the examination,⁶³⁵ is ground for an order of dismissal. The proceedings will be dismissed, on motion, where the judgment on which they are based is satisfied pending the proceedings, notwithstanding the attorney's lien for costs in the action is not paid, where the attorney may resort to another remedy to recover his costs.⁶³⁶ But if there is a serious conflict between the parties as to whether the judgment has in fact been paid, the party seeking relief will be left to his action, provided relief can be had in that form.⁶³⁷ While the pendency of supplementary proceedings does not preclude the issuance of a second execution yet if a sufficient levy is made thereunder the supplementary proceedings are suspended,⁶³⁸ and it would seem that an order of dismissal should be entered.⁶³⁹ The presumption of payment of the judgment after the lapse of twenty years, where the proceedings were commenced before the expiration of such time, is not ground for dismissal.⁶⁴⁰ Where the proceeding has been had before a referee it should not be discontinued or dismissed before the report of such referee.⁶⁴¹ From the fact that the proceeding is concluded, it does not follow that it is abandoned, discontinued or dismissed.⁶⁴²

§ 2405. Discontinuance.

A supplementary proceeding may be discontinued at any

⁶³⁴ *Squire v. Young*, 14 Super. Ct. (1 Bosw.) 690.

⁶³⁵ *Ballou v. Boland*, 14 Hun, 355.

⁶³⁶ *Rook v. Dickinson*, 38 Misc. 690, 78 N. Y. Supp. 287.

⁶³⁷ *Union Surety & Guaranty Co. v. Sire*, 34 Misc. 221, 68 N. Y. Supp. 943.

⁶³⁸ *Ritter v. Greason*, 28 Misc. 656, 59 N. Y. Supp. 1053, and cases cited.

⁶³⁹ *Ritter v. Greason*, 28 Misc. 656, 59 N. Y. Supp. 1053, seems to hold the contrary.

⁶⁴⁰ *Driggs v. Williams*, 15 Abb. Pr. 477.

⁶⁴¹ *Kennedy v. Norcott*, 54 How. Pr. 87.

⁶⁴² Code Civ. Proc. § 2454; *Wynkoop v. Myers*, 17 Civ. Proc. R. (Browne) 443, 7 N. Y. Supp. 898.

time, on such terms as justice requires, by an order of the judge, made on the application of the judgment creditor.⁶⁴³

§ 2406. Notice of application.

Where an order appointing a receiver, or extending a receivership, has been made in the course of the special proceeding, notice of the application for an order of discontinuance or dismissal must be given, in such a manner as the judge deems proper, to all persons interested in the receivership, as far as they can conveniently be ascertained.⁶⁴⁴ And it is the better practice, in every case, to give notice of the motion to dismiss or discontinue.

ART. XIII. RECEIVER.

(A) APPOINTMENT.

§ 2407. Time.

The Code provides as follows: "At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, the judge to whom the order or warrant is returnable may make an order appointing a receiver of the property of the judgment debtor."⁶⁴⁵ Under this Code section, a receiver may be appointed after the granting of an order to examine a third person as well as after an order to examine the judgment debtor.⁶⁴⁶ And a receiver may be appointed after the issuance of a warrant as well as after an order to attend and be examined.⁶⁴⁷ A receiver may be appointed before execution has been returned, where an order for examination has been made,⁶⁴⁸ and before the examination of the debtor,⁶⁴⁹ but not before an order for

⁶⁴³, ⁶⁴⁴ Code Civ. Proc. § 2454.

⁶⁴⁵ Code Civ. Proc. § 2464.

⁶⁴⁶ Rule was otherwise under old Code.

⁶⁴⁷ So held under old Code. *Wilson v. Andrews*, 9 How. Pr. 39.

⁶⁴⁸ *People v. Hulburt*, 5 How. Pr. 446, 9 N. Y. Leg. Obs. 245, Code R. (N. S.) 75; *De Vivier v. Smith*, 6 Civ. Proc. R. (Browne) 394.

⁶⁴⁹ *People v. Mead*, 29 How. Pr. 360.

examination or a warrant of arrest has been obtained.⁶⁵⁰ The lapse of several years, between the institution of supplementary proceedings and the appointment of a receiver, does not invalidate the appointment, though the proceedings were not regularly adjourned.⁶⁵¹

§ 2408. Who may appoint.

Any judge having jurisdiction to entertain supplementary proceedings may appoint a receiver in proceedings begun before him,⁶⁵² but the order can only be made by the judge who granted the order⁶⁵³ or by the judge to whom the order is returnable.

§ 2409. Application.

If the appointment of a receiver is sought before an examination has taken place, the facts to show the propriety thereof, i. e., the existence of property not exempt which cannot be reached by execution, must appear by affidavit. If the receiver is appointed after an examination, it is sufficient to present the report of the referee and the testimony taken. If another supplementary proceeding, or a creditor's suit, is pending against the same debtor, the facts should appear by affidavit so as to authorize the judge to fix the notice to be given to such creditor or creditors.

— **Notice of application.** Prior to the present Code, notice to the judgment debtor of the application for a receiver was not expressly required though it was held that such notice was necessary even when the debtor was a nonresident,⁶⁵⁴ and that an oral notice was insufficient.⁶⁵⁵ The Code now pro-

⁶⁵⁰ Code Civ. Proc. § 2464; *Holbrook v. Orgler*, 40 Super. Ct. (8 J. & S.) 33, 49 How. Pr. 289.

⁶⁵¹ *Wright v. Nostrand*, 94 N. Y. 31, 50.

⁶⁵² *Hyatt v. Dusenbury*, 12 Civ. Proc. R. (Browne) 152, 5 State Rep. 846.

⁶⁵³ *Smith v. Johnson*, 7 How. Pr. 39; *Ball v. Goodenough*, 37 How. Pr. 479.

⁶⁵⁴ *Whitney v. Welch*, 2 Abb. N. C. 442.

⁶⁵⁵ *Ashley v. Turner*, 22 Hun, 226.

vides that no further notice is required where the order to attend and be examined, or the warrant, has been served on the judgment debtor and the receiver is appointed on the return day thereof, or at the close of the examination;⁶⁵⁶ but, in other cases, that “at least two days notice of the application for the order appointing a receiver must be given personally⁶⁵⁷ to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state, in which case the order must recite that fact and may dispense with notice or may direct notice to be given in any manner which the judge thinks proper.”⁶⁵⁸ To warrant the appointment of a receiver without notice, under the last clause, the affidavit must state the facts to show the efforts made to ascertain the whereabouts of the debtor within the state,⁶⁵⁹ and if an allegation that the debtor is out of the state is based on information, the grounds of such information should be clearly stated.⁶⁶⁰ A counter notice that if the order appointing a receiver was vacated a motion would be made for the appointment of another as receiver is sufficient.⁶⁶¹ Failure to give such notice is an irregularity for which the order should be set aside,⁶⁶² except that the appearance by

⁶⁵⁶ Code Civ. Proc. § 2464; *Strohn v. Epstein*, 6 Civ. Proc. R. (Browne) 36; *Sickels v. Hanley*, 4 Abb. N. C. 231.

⁶⁵⁷ Service on the attorney of record in the action in which the judgment was recovered is insufficient. *Catholic University of America v. Conrad*, 27 Misc. 326, 57 N. Y. Supp. 820.

⁶⁵⁸ Code Civ. Proc. § 2464. This rule applies where receiver is appointed after order for examination of third person. Code Civ. Proc. § 2441.

⁶⁵⁹ *Gomprecht v. Scott*, 27 Misc. 192, 57 N. Y. Supp. 799.

⁶⁶⁰ *Henry v. Furbish*, 30 Misc. 822, 62 N. Y. Supp. 247, in which case the affidavit was as follows: “I have made a search for the judgment debtor herein but I cannot find him. I have been informed by Norton Chase, the receiver of the property of the judgment debtor, that the said judgment debtor is now without the state of New York and is somewhere in the South, and is not now within the state.”

⁶⁶¹ *Clark v. Clark*, 11 Abb. N. C. 333.

⁶⁶² *Henry v. Furbish*, 30 Misc. 822, 62 N. Y. Supp. 247.

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attorney on an application for the appointment of a receiver is a waiver of the two days notice.⁶⁶³

The judge must ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether a judgment creditor's suit or a supplementary proceeding is pending against the judgment debtor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment creditor prosecuting it.⁶⁶⁴ However, such judgment creditors may waive their right to notice and to priority, as where they practically abandon such proceedings and inform the moving creditor as to the existence of property and state that they will not stand in his way in obtaining a receiver.⁶⁶⁵ The notice required may be less than eight days.⁶⁶⁶

— Form of notice.

[Title of proceeding.]

To ———:

Take notice that an application for an order appointing a receiver of your property [or "of the property of ———, the judgment debtor herein"], in the above-entitled proceeding, will be made to the Hon. ———, judge of the ——— court, at ———, on the ——— day of ———, 190—, etc., and for such other and further relief as may be just.

That said application will be made on the following papers: [Name all of motion papers.]

[Date.]

[Signature and office address of attorney.]

§ 2410. Propriety of receivership.

Property discovered in supplementary proceedings may be reached either by (1) a permissive order (Code Civ. Proc. §

⁶⁶³ Moore v. Empie, 17 App. Div. 218, 79 State Rep. 539, 45 N. Y. Supp. 539.

⁶⁶⁴ Code Civ. Proc. § 2465; Todd v. Crooke, 6 Super. Ct. (4 Sandf.) 694; Sheffield Farm Co. v. Burr, 11 Misc. 638, 65 State Rep. 881, 32 N. Y. Supp. 1149. That oral direction as to the notice to be given is sufficient, see Darrow v. Riley, 5 Misc. 363, 26 N. Y. Supp. 91.

⁶⁶⁵ Barnett v. Moore, 20 Misc. 518, 46 N. Y. Supp. 668.

⁶⁶⁶ Leggett v. Sloan, 24 How. Pr. 479.

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2446) allowing a third person indebted to the judgment debtor to pay to a sheriff, or by (2) a mandatory order (Code Civ. Proc. § 2447) requiring the judgment debtor or a third person, to pay or deliver, to a sheriff or the receiver, money or other personal property, or by (3) the appointment of a receiver. Whether the judge will grant or refuse an order appointing a receiver is largely a matter of discretion; yet, in practice, it is usually a matter of course to appoint a receiver since no harm can result to the judgment debtor if he has no property and if he has any property not exempt which he refuses to disclose or turn over then it is just that a receiver be appointed to take the necessary steps to obtain such property. The appointment of a receiver is necessary whenever there are rights of action or equitable interests belonging to the judgment debtor which it is desired to convert into money, or when the judgment debtor's right to possession is substantially disputed,⁶⁶⁷ or where the third person examined denies his indebtedness to the debtor or interposes an adverse claim to the property.⁶⁶⁸ A receiver may be appointed to collect moneys ordered to be paid by a third person,⁶⁶⁹ or to bring a suit to redeem an equity of redemption.⁶⁷⁰

The practice is not to appoint a receiver unless some property has been disclosed,⁶⁷¹ yet the authorities uniformly hold that the judgment creditor has the right to the appointment of a receiver whether or not the examination indicates the ex-

⁶⁶⁷ *Ormes v. Baker*, 17 Wkly. Dig. 104. Where there is a question as to ownership of fund and debtor has disposed of it, a receiver should be appointed. *Matter of Becker*, 36 Misc. 322, 73 N. Y. Supp. 577.

⁶⁶⁸ 3 *Freeman*, Executions, p. 2239; *Corning v. Tooker*, 5 How. Pr. 16. Personal property, though subject to execution, if in the hands of third persons claiming title thereto, warrants a receiver. *Todd v. Crooke*, 6 Super. Ct. (4 Sandf.) 694.

⁶⁶⁹ *Patten v. Connah*, 13 Abb. Pr. 418; *McCrea v. Cook*, 1 City Ct. R. 385; *Birnbaum v. Thompson*, 5 Month. Law Bul. 30.

⁶⁷⁰ *Bunacleugh v. Poolman*, 3 Daly, 236.

⁶⁷¹ *Dease v. Reese*, 39 Misc. 657, 661, 80 N. Y. Supp. 590. A claim for unliquidated damages is not property. *Bryan v. Grant*, 87 Hun, 68, 33 N. Y. Supp. 957.

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istence of property.⁶⁷² A receiver may be appointed even though the debtor denies that the property disclosed is of any value,⁶⁷³ or though it seems that there is little or no equity remaining in the debtor,⁶⁷⁴ or though he denies his ownership of certain shares of stock standing in his name on the books of the company and states that he has previously disposed of it.⁶⁷⁵ If the defendant denies that he has any property, but there remains a real controversy or doubt about the correctness of his claim, the appointment of a receiver should not be disturbed on appeal.⁶⁷⁶ A receiver has been held properly appointed where the only property was an equity of redemption which the debtor had always been willing to have sold.⁶⁷⁷

Ordinarily, however, a receiver will not be appointed for the purpose of doing for the creditor what he may do for himself. A receiver should not be appointed (1) where the only property is real estate which can be reached by execution,⁶⁷⁸ or (2) where the only property is exempt,⁶⁷⁹ or (3) where the only property is property acquired since the service of the order for examination. Thus, a receiver should not be

⁶⁷² Myres' Case, 2 Abb. Pr. 476; Dease v. Reese, 39 Misc. 657, 661, 80 N. Y. Supp. 590, and cases cited; Kelsey v. Webb, 94 App. Div. 571, 88 N. Y. Supp. 4. The judgment debtor cannot object since he cannot be prejudiced by the granting of the application.

⁶⁷³ Webb v. Overman, 6 Abb. Pr. 92.

⁶⁷⁴ Matter of Crane, 81 Hun, 96, 62 State Rep. 549, 1 Ann. Cas. 148, 30 N. Y. Supp. 616.

⁶⁷⁵ Hoyt v. Mann, 7 State Rep. 420, 26 Wkly. Dig. 249.

⁶⁷⁶ Kelsey v. Webb, 94 App. Div. 571, 88 N. Y. Supp. 4.

⁶⁷⁷ Bailey v. Lane, 15 Abb. Pr. 373, note.

⁶⁷⁸ Bunn v. Daly, 24 Hun, 526; followed in Albany City Nat. Bank v. Gaynor, 67 How. Pr. 421; Moyer v. Moyer, 7 App. Div. 523, 531, 40 N. Y. Supp. 258. Contra, Heroy v. Gibson, 23 Super. Ct. (10 Bosw.) 591. But the fact that the examination shows that defendant holds the legal title to heavily encumbered real estate, out of which it was improbable that the execution could have been collected in whole or in part, is no reason for refusing a receiver. Baker v. Herkimer, 43 Hun, 86, 6 State Rep. 581, 25 Wkly. Dig. 573.

⁶⁷⁹ Keiher v. Shipherd, 4 Civ. Proc. R. (Browne) 274; Matter of Edlunds, 35 Hun, 367.

appointed where the only assets are some uncertain contingent fees in cases to be tried.⁶⁸⁰ So a receiver should not be granted where full justice can be done by offsetting judgments.⁶⁸¹ So a receiver will not be appointed, where the judgment has been satisfied, to collect for the attorney costs of the supplementary proceedings which have not been allowed.⁶⁸² And, of course, a release from the judgment precludes the appointment of a receiver.⁶⁸³ It is discretionary to refuse to appoint a receiver to sue to set aside a fraudulent conveyance.⁶⁸⁴ The fact that a corporation in whose favor a judgment was rendered had gone into the hands of a receiver subsequent to the recovery of the judgment does not invalidate the appointment of a receiver in supplementary proceedings.⁶⁸⁵

§ 2411. Who may be appointed.

No person shall be appointed a receiver in this state who is not a resident thereof.⁶⁸⁶ The rules applicable to receivers generally also apply.⁶⁸⁷

§ 2412. Number of receivers.

Only one receiver of the property of a judgment debtor shall be appointed,⁶⁸⁸ no matter how many proceedings are pending.⁶⁸⁹ But the fact that a receiver of a judgment debtor's property has been appointed in supplementary proceedings does not prevent another and different receiver from being appointed in a judgment creditor's action.⁶⁹⁰

⁶⁸⁰ *Gibney v. Reilly*, 26 Misc. 275, 56 N. Y. Supp. 1055.

⁶⁸¹ *De Camp v. Dempsey*, 10 Civ. Proc. R. (Browne) 210.

⁶⁸² *Paterson v. Goorley*, 14 Misc. 56, 69 State Rep. 651, 35 N. Y. Supp. 297.

⁶⁸³ *Hunter v. Hunter*, 67 App. Div. 470, 73 N. Y. Supp. 886.

⁶⁸⁴ *Dollard v. Taylor*, 33 Super. Ct. (1 J. & S.) 496.

⁶⁸⁵ *Wright v. Nostrand*, 94 N. Y. 31.

⁶⁸⁶ Code Civ. Proc. § 2469, subd. 5. Added by amendment in 1892.

⁶⁸⁷ Volume 2, p. 1632.

⁶⁸⁸ Code Civ. Proc. § 2466.

⁶⁸⁹ *Myrick v. Selden*, 36 Barb. 15.

⁶⁹⁰ *State Bank of Syracuse v. Gill*, 23 Hun, 410.

§ 2413. Order.

The order appointing a receiver usually not only restrains the judgment debtor from disposing of his property, but also orders the debtor to deliver to the receiver all his personal property and to convey his real property.⁶⁹¹ It seems, however, that neither of such provisions is necessary,⁶⁹² though an order for examination which merely restrains the disposing of property "until further order in the premises" is ineffective as an injunction after an order appointing a receiver.⁶⁹³ If the judge is satisfied that the judgment debtor cannot, with reasonable diligence, be found within the state, the order must recite that fact,⁶⁹⁴ and show either that notice was dispensed with or what notice was given. It is customary to insert in the order the allowance of costs to the judgment creditor, as authorized by section 2455 of the Code. The order must appoint a receiver of "all" the property of the judgment debtor and not merely of a specified part, or certain articles, of the debtor's property.⁶⁹⁵ The order appointing a receiver on the examination of a third person cannot finally adjudicate the right to property in such person's hands but may restrain him from paying or delivering it to any other person.⁶⁹⁶

⁶⁹¹ Form of clause: "It is further ordered, that —, upon being served with a certified copy of this order and of notice of filing of the bond prescribed by this order, deliver to said receiver all property and money now in his or their possession, or under his control, belonging to the said —, and not exempt by section 2463 of the Code of Civil Procedure, or otherwise."

⁶⁹² Property vests in receiver by operation of law.

⁶⁹³ *People v. Randall*, 73 N. Y. 416.

⁶⁹⁴ Code Civ. Proc. § 2464. It seems that a recital in the order that notice cannot, with due diligence, be given, is, of itself, insufficient, but it must refer to the affidavits which must show the facts as to such diligence. *Grace v. Curtiss*, 3 Misc. 558, 52 State Rep. 514, 23 N. Y. Supp. 321.

⁶⁹⁵ *Andrews v. Glenville Woolen Co.*, 11 Abb. Pr. (N. S.) 78.

⁶⁹⁶ *Manice v. Smith*, 5 Wkly. Dig. 255.

Art. XIII. Receiver.—A. Appointment.—Order

— Form of order.

[Title of proceedings.]

An order having been heretofore made by me [or "by Hon. ———, judge," etc.] herein, on the ——— day of ———, 190—, in the above proceedings, requiring ——— to appear and make discovery on oath concerning his property, before ———, and the said judgment debtor having appeared and been examined accordingly, and at least two days' notice of this application having been given to ———, the judgment debtor, personally.⁶⁹⁷

Now, on filing the affidavit and order of examination herein and the evidence taken therein, and on motion of ———, attorney for ———, I do hereby order that ——— of ——— be, and I do hereby appoint him, receiver of all the property, debts, equitable interests, rights and things in action, effects and estate, real and personal, of the said ———, the judgment debtor herein; and I do further order that said receiver, before entering on the duties of his trust, execute and acknowledge a bond with sufficient sureties to be approved by ———, to the people of the state of New York, in the penalty of ——— dollars, conditioned for the faithful discharge of his duties as such receiver, and that upon filing said bond and this order as required by law, the said receiver shall be invested with all the rights and powers of a receiver as such according to law.

And I do further order that there be allowed to the plaintiff, judgment creditor, the sum of ——— dollars costs, and ——— dollars, his disbursements in these proceedings, and I direct that the same be paid by said receiver to such judgment creditor, or his attorney herein out of the first moneys coming into said receiver's hands.

[Date.]

—————,
Justice of ——— court.

— Filing and recording. Sections 2467 and 2468 of the Code provide as to the necessity of filing the order of appointment. They will be considered hereafter.⁶⁹⁸ Each county clerk must keep in his office a book, indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment debtors." A county clerk, in whose office is filed an order or a certified copy of an order appointing a receiver, or extending a receivership, must immediately note thereupon the time of filing it, and, as soon as practicable

⁶⁹⁷ If notice not given because whereabouts of debtor were not known, make statement required by section 2464 of the Code.

⁶⁹⁸ See post, § 2321.

able, must record it, in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits, to the party aggrieved, two hundred and fifty dollars, in addition to all damages sustained by reason of the omission.⁶⁹⁹

— **Vacating order.** Irregularities in the order appointing a receiver are available only to the judgment debtor and then only on a direct motion to vacate the order. For instance, false statements in the affidavit as to the return of execution unsatisfied cannot be taken advantage of by a junior judgment creditor who moves to set aside the appointment of a receiver.⁷⁰⁰ Where the objection is jurisdictional, the rule is different. Thus, the objection that the execution was irregular, when apparent on the face of the affidavit presented on the application for the judgment debtor's examination, is available to a junior judgment creditor and entitles him to have the order appointing the receiver vacated.⁷⁰¹ The mere countermand of the execution in the action does not, ipso facto, vacate the order appointing a receiver.⁷⁰² Laches may preclude a motion to vacate the order,⁷⁰³ but the order may be vacated where the proceedings have been abandoned for a long time.⁷⁰⁴ If a motion is made to vacate an order appointing a receiver, on the ground that no personal notice was served on the judgment debtor, the judgment creditor may serve a counter notice that if the original order is vacated a motion will be made on his behalf for the appointment of a second receiver.⁷⁰⁵

⁶⁹⁹ Code Civ. Proc. § 2470.

⁷⁰⁰ Only the judgment debtor can object. *Baker v. Brundage*, 79 Hun, 382, 29 N. Y. Supp. 792.

⁷⁰¹ *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

⁷⁰² *Palmer v. Colville*, 63 Hun, 536, 45 State Rep. 706, 18 N. Y. Supp.

509.

⁷⁰³ *Terry v. Bange*, 18 Civ. Proc. R. (Browne) 288, 57 Super. Ct. (25 J. & S.) 546, 30 State Rep. 285, 9 N. Y. Supp. 311.

⁷⁰⁴ *Thayer v. Dempsey*, 25 Wkly. Dig. 457.

⁷⁰⁵ *Clark v. Clark*, 11 Abb. N. C. 333.

— **Appeal.** An order appointing, or refusing to appoint, a receiver, is appealable,⁷⁰⁶ provided the rules laid down in section 2433 of the Code are observed. Ordinarily the order will not be reversed.⁷⁰⁷ The validity of the order appointing a receiver cannot be questioned on appeal from an order directing the receiver to pay over moneys where the former order is merely one of the papers on which the appeal is taken.⁷⁰⁸

§ 2414. Security.

Section 715 of the Code which requires the receiver to execute and file a bond applies to supplementary proceedings. There is no special provision as to security in the Code chapter on supplementary proceedings. Reference should be made to a preceding volume for a collection of the rules relating to the security required of all receivers.⁷⁰⁹ The appointment of a receiver is not perfected until the requisite security is filed.⁷¹⁰ If the security given by the receiver is sufficiently ample to cover all the property of the debtor, additional security need not be required on extending a receivership.⁷¹¹ The omission of seals from the bond of a receiver in supplementary proceedings is an irregularity and not jurisdictional, and cannot be set up in an action brought by such receiver to set aside a conveyance.⁷¹²

— Form of receiver's bond.

Know all men by these presents, that we, — of — [merchant], and — of — [merchant] are held and firmly bound unto — in the sum of — dollars, lawful money of the United States, to be paid to the said —, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated the — day of —, 190—.

⁷⁰⁶ *Dollard v. Taylor*, 33 Super. Ct. (1 J. & S.) 496.

⁷⁰⁷ *Kelsey v. Webb*, 94 App. Div. 571, 88 N. Y. Supp. 4.

⁷⁰⁸ *Gomprecht v. Scott*, 27 Misc. 192, 57 N. Y. Supp. 799.

⁷⁰⁹ Volume 2, pp. 1634-1637.

⁷¹⁰, ⁷¹¹ *Banks v. Potter*, 21 How. Pr. 469, 471, 473.

⁷¹² *Hyatt v. Dusenbury*, 12 Civ. Proc. R. (Browne) 152.

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Whereas, by an order made by the Hon. ———, on the ——— day of ———, 190—, in proceedings supplementary to the judgment and execution in an action in said court, wherein ——— was plaintiff and judgment creditor and ——— was defendant and judgment debtor, the above bounden ——— was appointed receiver of all the debts, property, equitable interests, rights, and things in action, effects and estate real and personal of said ———.

Now the condition of this obligation is such, that if the said ——— shall faithfully discharge the duties of his trust, as such receiver, then this obligation to be void, otherwise to be in full force and effect.

[Signatures.]

[Justification of obligors.]

[Certificate of acknowledgment.]

[Indorse on back approval of bond and sureties.]

§ 2415. Extension of receivership.

Where a receiver of the property of a judgment debtor has already been appointed, the judge, instead of making the order appointing a receiver, must make an order extending the receivership to the special proceeding before him. Such an order gives to the judgment creditor the same rights, as if a receiver was then appointed upon his application, including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment.⁷¹³ The receivership cannot be extended after the death of the judgment debtor.⁷¹⁴ Notice of an application to extend a receivership must be given to the judgment debtor.⁷¹⁵

—— Form of order.

[Title of proceedings.]

It appearing from ——— that ———, of the city of ———, has heretofore been appointed receiver of the property of the said ———, the

⁷¹³ Code Civ. Proc. § 2466. This section does not apply to a creditor's suit so as to compel the same receiver to be appointed therein as has been appointed in supplementary proceedings. *State Bank of Syracuse v. Gill*, 23 Hun, 410. General rules as to double receivership, see vol. 2, p. 1628.

⁷¹⁴ *Matter of Tribune Ass'n*, 13 Misc. 326, 68 State Rep. 363, 34 N. Y. Supp. 459.

⁷¹⁵ *Benjamin v. Myers*, 3 State Rep. 284.

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judgment debtor, in a proceeding [or action] ———; and it appearing to my satisfaction that the said receiver has, on such appointment, given ample security for the faithful discharge of his duties, as such, and that such receivership is pending undischarged, I do hereby order that said receivership be, and it hereby is, extended to the special proceeding herein, pursuant to the provisions of section 2466 of the Code of Civil Procedure.

[Date.]

Justice of ——— court.

§ 2416. New receiver.

No person shall continue to act as receiver after he ceases to be a resident of the state, and the judgment creditor may apply to the court or judge that appointed such receiver, within thirty days after said receiver ceases to be a resident of this state, for the appointment of another person in his place, on such notice to the persons interested as the court or judge may direct.⁷¹⁶ An application for a receiver to succeed a deceased receiver appointed in supplementary proceedings is properly made to the supreme court rather than to the county judge who appointed the original receiver, where the original receiver had filed a creditor's bill under the direction of the supreme court to reach certain assets of defendant, pending which he died.⁷¹⁷

The receiver may be removed for good cause shown,⁷¹⁸ but not without notice and an opportunity to be heard.⁷¹⁹ A receiver has been removed where no notice of the application for his appointment was given, and where the party moving for his appointment, and his attorney, occupied offices in the same building as the receiver.⁷²⁰

§ 2417. Discharge.

The general rules relating to the discharge of a receiver have been considered in a preceding volume.⁷²¹ The payment of

⁷¹⁶ Code Civ. Proc. § 2469, subd. 5. Added by amendment in 1892.

⁷¹⁷ *Smith v. Barnum*, 59 App. Div. 291, 69 N. Y. Supp. 253.

⁷¹⁸ Volume 2, p. 1638.

⁷¹⁹ *Campbell v. Spratt*, 5 Wkly. Dig. 25.

⁷²⁰ *Fraser v. Hunt*, N. Y. Daily Reg., Dec. 19, 1882.

⁷²¹ Volume 2, p. 1656.

a judgment by the debtor, after the appointment of a receiver, does not, ipso facto, discharge the receiver.⁷²² The discharge of the receiver reinstates the owners with title to their property.⁷²³

2418. Waiver of objections.

Appearance and failure to object to the appointment of a receiver waives objections to the regularity of the proceedings.⁷²⁴

§ 2419. Collateral attack.

Mere irregularities in the appointment of the receiver cannot be urged by a collateral attack,⁷²⁵ where such irregularities do not affect the jurisdiction of the judge who made the appointment.⁷²⁶ For instance, the appointment of the clerk of the court in which the proceeding is pending, as receiver, in violation of the Code, is a mere irregularity which cannot be set up in a collateral proceeding. A judgment debtor is the only person who can avail himself of an irregularity in the appointment of a receiver,⁷²⁷ and a stranger cannot deny the title of the receiver for any irregularity in the proceedings prior to the assignment.⁷²⁸ So it cannot be claimed by a junior judgment creditor that the remedy by execution was not exhausted before the appointment of the receiver where the judgment debtor has consented to the appointment.⁷²⁹

⁷²² Crook v. Findley, 60 How. Pr. 375.

⁷²³ Lanigan v. City of New York, 70 N. Y. 454.

⁷²⁴ Underwood v. Sutcliffe, 10 Hun, 453; Moore v. Empie, 17 App. Div. 218, 45 N. Y. Supp. 539.

⁷²⁵ Powell v. Waldron, 89 N. Y. 328; Stanley v. National Union Bank, 115 N. Y. 122; Gomprecht v. Scott, 27 Misc. 192, 57 N. Y. Supp. 799; Stiefel v. Berlin, 28 App. Div. 103, 51 N. Y. Supp. 147.

⁷²⁶ Tyler v. Whitney, 12 Abb. Pr. 465; Tyler v. Willis, 33 Barb. 327.

⁷²⁷ Underwood v. Sutcliffe, 10 Hun, 453; Baker v. Brundage, 79 Hun, 382, 61 State Rep. 498, 29 N. Y. Supp. 792.

⁷²⁸ Richards v. Allen, 3 E. D. Smith, 399.

⁷²⁹ Webb v. Osborne, 15 Daly, 406, 27 State Rep. 792, 7 N. Y. Supp. 762; Baker v. Brundage, 79 Hun, 382, 61 State Rep. 498, 29 N. Y. Supp. 792

§ 2420. **Effect.**

The appointment of a receiver does not discontinue the supplementary proceedings so as to relieve a third person from examination after such appointment.⁷³⁰ The proceeding is not terminated until the judgment is satisfied.⁷³¹

(B) POWERS, DUTIES, AND LIABILITIES.

§ 2421. **When property vests in receiver.**

In all cases, an order appointing a receiver, or extending a receivership,⁷³² must be filed in the office of the clerk of the county, wherein the judgment roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court other than that in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed.⁷³³ When the order is so filed,⁷³⁴ and the receiver has duly qualified by giving security,⁷³⁵ the property of the judgment debtor is vested in the receiver, subject to the following exceptions:⁷³⁶

— **Real property.** Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.⁷³⁷ This means a filing in addition to that required by section 2467 of the Code as set forth above. But if the real property is situated in the same county in which the judgment roll is filed, one filing and recording of the order is all that is needed.⁷³⁸ It should be noticed that the filing of the order of appointment in a county where

⁷³⁰ *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99.

⁷³¹ *Matter of Crane*, 81 Hun, 96, 62 State Rep. 549, 1 Ann. Cas. 148, 30 N. Y. Supp. 616.

⁷³² It has been held sufficient that the order extending the receivership is filed though the original order appointing a receiver is not filed. *Webb v. Osborne*, 15 Daly, 406, 27 State Rep. 792, 7 N. Y. Supp. 762.

⁷³³ Code Civ. Proc. § 2467.

⁷³⁴ *Moyer v. Moyer*, 7 App. Div. 523, 529, 40 N. Y. Supp. 258.

⁷³⁵, ⁷³⁶ Code Civ. Proc. § 2468.

⁷³⁷ Code Civ. Proc. § 2468, subd. 1.

⁷³⁸ *Fredericks v. Niver*, 28 Hun, 417.

the judgment has not been docketed nor execution issued, gives the receiver no title to real estate of the judgment debtor therein.⁷³⁹ The old rule was that title to real estate did not pass to the receiver without a conveyance,⁷⁴⁰ but the rule now is that it passes without a conveyance where the property is within the state.⁷⁴¹ The receiver is not vested with title to real estate located outside the state, and the "judge" who appoints the receiver cannot order such real estate to be conveyed to the judgment creditor,⁷⁴² though it seems that a "court" which has jurisdiction of the person of the judgment debtor may, in equity, compel such a conveyance.⁷⁴³ There is no statutory authority, in any case, for an order requiring a conveyance of real estate to the receiver, since section 2447 of the Code which expressly provides for delivery or payment to a sheriff or a receiver does not embrace real property;⁷⁴⁴ and there is no other Code provision relating thereto.

— **Personal property.** Personal property is vested in the receiver from the time of the filing of the order appointing him or extending his receivership, as the case may be, except that where the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal

⁷³⁹ If lien is lost by lapse of ten years (Code Civ. Proc. § 1251) property cannot be subjected to judgment. *Faneuil Hall Nat. Bank v. Bussing*, 147 N. Y. 665.

⁷⁴⁰ *Scott v. Elmore*, 10 Hun, 68.

⁷⁴¹ *Wing v. Disse*, 15 Hun, 190; *Manning v. Evans*, 19 Hun, 500; *Kimball v. Burrell*, 14 State Rep. 536; *Moyer v. Moyer*, 7 App. Div. 523, 40 N. Y. Supp. 258. Debtor will not be directed to deliver to a receiver possession of real property on which the judgment is a lien. The remedy is by a sale on execution. *Albany City Nat. Bank v. Gaynor*, 67 How. Pr. 421.

⁷⁴² *First Nat. Bank of Canandaigua v. Martin*, 49 Hun, 571, 2 N. Y. Supp. 315. The remedy in such case is by a creditor's suit. *Smith v. Tozer*, 42 Hun, 22, 11 Civ. Proc. R. (Browne) 343, 3 State Rep. 363, 25 Wkly. Dig. 252. Rule under old Code was to the contrary. *Fenner v. Sanborn*, 37 Barb. 610.

⁷⁴³ *Smith v. Tozer*, 42 Hun, 22; *Fenner v. Sanborn*, 37 Barb. 610, 611. But see *Moyer v. Moyer*, 7 App. Div. 523, 529, 40 N. Y. Supp. 258.

⁷⁴⁴ See ante, § 2395.

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property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides.⁷⁴⁵ But notwithstanding the fact that the personal property is vested from such time, the judge may, as already stated,⁷⁴⁶ order the judgment debtor or a third person to “deliver” personal property to the receiver. The court may compel the judgment debtor to execute and deliver to the receiver an assignment of personal property, such as letters patent, where the title to the property cannot pass except by a written assignment.⁷⁴⁷

§ 2422. Relation back of receiver's title to personal property.

Where the receiver's title to “personal property” has become vested, it also extends back, by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, as follows:

1. Where an order requiring the judgment debtor to attend and be examined, or a warrant requiring the sheriff to arrest him and bring him before the judge, has been served before the appointment of the receiver or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or warrant.

2. Where such an order or warrant has not been served, but an order has been made requiring a person to attend and be examined, concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor which was in the hands or under the control of the person or corporation thus required to attend, at the time of the service of the order, and to a debt then due to him from that person or corporation.

⁷⁴⁵ Code Civ. Proc. § 2468; *Staats v. Wemple*, 2 How. Pr. (N. S.) 161; *Bareither v. Brosche*, 19 Civ. Proc. R. (Browne) 446, 13 N. Y. Supp. 561.

⁷⁴⁶ See ante, § 2395.

⁷⁴⁷ *Clan Ranald v. Wyckoff*, 41 Super. Ct. (9 J. & S.) 527.

3. In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally, or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration, or the payment of a debt in good faith, and without notice.⁷⁴⁸ The last sentence refers only to a purchase or payment made prior to the filing of the order appointing a receiver,⁷⁴⁹ but it does protect a purchaser in good faith of past due promissory notes.⁷⁵⁰

Under this Code provision, it is held that a receiver appointed under a senior judgment and execution cannot recover from an execution creditor the proceeds received by the latter from a sale of tangible personal property of the judgment debtor under a junior judgment and execution, where the levy and sale took place before the receiver qualified.⁷⁵¹ This provision was not contained in the former Code. It appears to have been inserted to change a rule laid down by the court of appeals,⁷⁵² to the effect that no equitable lien was acquired by a creditor on the property of his debtor by the commencement of supplementary proceedings, and that when a receiver is appointed his title relates to the date of his appointment, and is subject to any lien on the debtor's property acquired by third persons intermediate the commencement of the proceedings and the appointment of the receiver.

⁷⁴⁸ Code Civ. Proc. § 2469. Provision applied in *Clark v. Gilbert*, 10 Daly, 317; *McCorkle v. Herrman*, 117 N. Y. 297.

⁷⁴⁹ *Fitzpatrick v. Moses*, 34 App. Div. 242, 54 N. Y. Supp. 426.

⁷⁵⁰ *Matter of Clover*, 154 N. Y. 443.

⁷⁵¹ *Droege v. Baxter*, 69 App. Div. 58, 74 N. Y. Supp. 585.

⁷⁵² *Becker v. Torrance*, 31 N. Y. 631. See, also, *Fillmore v. Horton*, 31 How. Pr. 424.

§ 2423. What property vests in receiver.

All the property of the judgment debtor, whether in the possession of the debtor or a third person, which he had at the time of the service of the order for examination, vests in the receiver, except (1) exempt property,⁷⁵³ (2) property outside of the state, and (3) property acquired after the commencement of the proceedings.⁷⁵⁴ For instance, it is held that money due to the debtor on an insurance policy, by reason of a loss which occurred after the appointment of a receiver is subsequently acquired property which does not pass to the receiver.⁷⁵⁵ So it is held that where a cause of action has accrued to the judgment debtor since the appointment of the receiver, the receiver cannot bring suit thereon.⁷⁵⁶ The receiver acquires title only to property belonging to the judgment debtor at the time the supplementary proceedings were commenced.⁷⁵⁷ He does not acquire "title" to property fraudulently transferred prior to his appointment but only a "right" to bring an action to set aside such transfer.⁷⁵⁸ Property held

⁷⁵³ Cause of action for conversion of exempt property. *Andrews v. Rowan*, 28 How. Pr. 126; *Tillotson v. Wolcott*, 48 N. Y. 188. Income of trust. *Matter of Seymour*, 76 App. Div. 300, 79 N. Y. Supp. 122; *Levy v. Bull*, 47 Hun, 350.

⁷⁵⁴ *Sands v. Roberts*, 8 Abb. Pr. 343; *Norcross v. Hollingsworth*, 83 Hun, 127, 64 State Rep. 264, 31 N. Y. Supp. 627; *Dubois v. Cassidy*, 75 N. Y. 298. But in *Boynton v. Seibert*, 33 Misc. 310, 68 N. Y. Supp. 562, it was held that a receiver could sue the employer of the judgment debtor to recover a certain percentage of their net receipts, which they had agreed to pay the debtor on a contract for services, notwithstanding that all the work under the contract was performed before the appointment of the receiver and that said percentage was not due until the completion of the contract. This rule is carried too far, it is submitted, in *Thorn v. Fellows*, 5 Wkly. Dig. 473, where it is held that notes substituted in the place of other notes held by the judgment debtor are after-acquired property.

⁷⁵⁵ *Sands v. Roberts*, 8 Abb. Pr. 343.

⁷⁵⁶ *Norcross v. Hollingsworth*, 83 Hun, 127, 31 N. Y. Supp. 627.

⁷⁵⁷ *Campbell v. Genet*, 2 Hilt. 290; followed in *Dubois v. Cassidy*, 75 N. Y. 298, 302.

⁷⁵⁸ *Metcalf v. Del Valle*, 64 Hun, 245, 19 N. Y. Supp. 16.

by the judgment debtor in an official capacity does not pass to the receiver.⁷⁵⁹

— **Personal property.** The receiver acquires not only the title to all the personal property in the hands of the debtor but also to all his personal property in the possession of others at the time of the service of the order for examination.⁷⁶⁰ The title passes without an assignment.⁷⁶¹ The receiver takes title, *inter alia*, to a seat in an exchange;⁷⁶² a judgment recovered by the judgment debtor on a chose in action, after the appointment of the receiver;⁷⁶³ the equitable interest of the next of kin in an estate the legal title to which is in the administrator;⁷⁶⁴ an unpaid legacy to the judgment debtor;⁷⁶⁵ etc.⁷⁶⁶ It is doubtful whether a cause of action for a personal tort passes to the receiver,⁷⁶⁷ though a cause of action for injuries to property rights passes since such a cause of action is assignable.⁷⁶⁸

— **Real property.** The title to real property passes without a conveyance if it is within the state. If not within the state, only the court has power to compel a conveyance.⁷⁶⁹ The title of the receiver, however, is a qualified one, and the judgment debtor retains the legal title which he may convey subject

⁷⁵⁹ *Norcross v. Hollingsworth*, 83 Hun, 127, 64 State Rep. 264, 31 N. Y. Supp. 627.

⁷⁶⁰ *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 647; *Bostwick v. Menck*, 40 N. Y. 383, 384.

⁷⁶¹ *Barnes v. Morgan*, 3 Hun, 703, 6 T. & C. 105.

⁷⁶² *Leggatt v. Waller*, 39 Misc. 408, 80 N. Y. Supp. 13; *Powell v. Waldron*, 89 N. Y. 328.

⁷⁶³ *Swartout v. Schwerter*, 5 Redf. 497.

⁷⁶⁴ *Matter of Rainey*, 5 Misc. 367, 26 N. Y. Supp. 892.

⁷⁶⁵ *Monahan v. Fitzpatrick*, 16 Misc. 508, 39 N. Y. Supp. 857.

⁷⁶⁶ Alimony as subject to supplementary proceedings, see *Stevenson v. Stevenson*, 34 Hun, 157; *Romaine v. Chauncey*, 39 State Rep. 480, 15 N. Y. Supp. 198.

⁷⁶⁷ That it does not, see *Cotterell v. Slosson*, N. Y. Daily Reg., Jan. 6, 1884; *Bryant v. Grant*, 87 Hun, 68, 67 State Rep. 639, 33 N. Y. Supp. 957. But cause of action based on contract may be reached, where suit is pending. *Ten Broeck v. Sloo*, 2 Abb. Pr. 234, 13 How. Pr. 28.

⁷⁶⁸ *Bennett v. Wolfolk*, 80 Hun, 390, 62 State Rep. 55, 30 N. Y. Supp. 128.

⁷⁶⁹ See *ante*, § 2421.

to the right of the receiver to resort to it to pay the judgment.⁷⁷⁰ But where the judgment debtor “conveys” his real property to a receiver, the title vests in the latter subject only to the right of the debtor to compel an accounting.⁷⁷¹ An estate as tenant by curtesy passes to a receiver.⁷⁷² It has been held that the receiver takes an unassigned right of dower of a judgment debtor who is a widow,⁷⁷³ though a late case holds that an inchoate dower right cannot be reached in a creditor’s suit.⁷⁷⁴

§ 2424. Rights, duties, and liabilities of receiver.

The receiver does not represent merely the debtor. Nor does he represent merely the creditor. He represents both.⁷⁷⁵ He represents the creditor only with reference to the property of the debtor. His duty is to collect, by action if necessary, sufficient money to pay the amount owing the judgment creditor and the costs and expenses. When that is done, his duties cease. He takes title as a trustee, commissioned to dispose of the property and pay the judgment debtor. He takes title subject to all liens existing at the time of the service of the order for examination,⁷⁷⁶ and stands in the same position as the debtor,⁷⁷⁷ except that, as representing the creditor, he may bring actions which the debtor could not. His duties are analo-

⁷⁷⁰ *Moore v. Duffy*, 74 Hun, 78, 57 State Rep. 746, 26 N. Y. Supp. 340; *Faneuil Hall Nat. Bank v. Bussing*, 147 N. Y. 665, 670.

⁷⁷¹ *Graham v. Lawyers' Title Ins. Co.*, 20 App. Div. 440, 46 N. Y. Supp. 1055.

⁷⁷² *Beamish v. Hoyt*, 25 Super. Ct. (2 Rob.) 307.

⁷⁷³ *Sayles v. Naylor*, 5 State Rep. 816.

⁷⁷⁴ *Sherman v. Hayward*, 98 App. Div. 254, 90 N. Y. Supp. 481.

⁷⁷⁵ *Cumming v. Egerton*, 22 Super. Ct. (9 Bosw.) 684. One of the clearest opinions to be found in the books as to the title and powers of a receiver is the decision of Judge Vann in *Ward v. Petrie*, 157 N. Y. 301.

⁷⁷⁶ *McCorkle v. Herrmann*, 22 State Rep. 519, 5 N. Y. Supp. 881; *Deady v. Fink*, 24 State Rep. 734, 5 N. Y. Supp. 3. *Lis pendens*. *Spencer v. Berdell*, 45 Hun, 179.

⁷⁷⁷ *McCorkle v. Herrmann*, 22 State Rep. 519, 5 N. Y. Supp. 881; *Gardner v. Smith*, 29 Barb. 68.

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gous to those of a receiver appointed by the court of chancery on a creditor's bill.⁷⁷⁸ Rule 77 of the General Rules of Practice is applicable to the powers and duties of a receiver appointed in supplementary proceedings.

— **Real property.** As already stated,⁷⁷⁹ the receiver takes only a qualified title to the real estate, i. e., he holds it as security. It follows that the receiver cannot sell the real estate but merely has the right of possession for ten years from the docketing of the judgment, provided, in the meantime, there is no valid sale of the property under an execution followed by a sheriff's deed.⁷⁸⁰ In any event, the receiver will not be permitted to sell real estate where there exists no impediment to a sale of the same under an execution on the judgment.⁷⁸¹ A receiver may, on leave of a judge having power to appoint such receiver, lease the real property that shall come into his possession for such time as shall be necessary to realize moneys sufficient to satisfy the judgment, with interest thereon and costs of the special proceeding;⁷⁸² and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn and pay their rents to him.⁷⁸³

⁷⁷⁸ *Petition of Inglehart, Sheld.* 514.

⁷⁷⁹ See ante, § 2423.

⁷⁸⁰ *Chadeayne v. Gwyer*, 83 App. Div. 403, 409, 82 N. Y. Supp. 198. He can sue for a partition of the premises. *Steenberge v. Low*, 92 N. Y. Supp. 518.

⁷⁸¹ *Pfluger v. Cornell*, 2 City Ct. R. 145; *Petition of Inglehart, Sheld.* 514; *Monolithic Drain & Conduit Co. v. Dewsnap*, 25 Civ. Proc. R. (Scott) 380, 41 N. Y. Supp. 224.

⁷⁸² Code Civ. Proc. § 2449. Rule 77 of General Rules of Practice provides that a receiver "shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year."

⁷⁸³ Rule 77 of General Rules of Practice. But in *Whyte v. Denike*, 53 App. Div. 425, 65 N. Y. Supp. 1081, it was held where a receiver recovers a judgment setting aside a deed from the judgment-debtor to his wife as fraudulent, he cannot, by reason of authority to apply, without notice to defendants, for further directions upon the foot of the judgment, and for further relief, be allowed an ex parte order directing the tenant of the premises described to attorn and pay the rent to him, since the title did not pass to him, either by his appointment or by the recovery of the judgment, and the provisions of Code Civ. Proc. § 2468, that the

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The receiver, after he has filed his order of appointment, is entitled to collect the rents of the debtor's real property,⁷⁸⁴ and he may recover the rent due at the time of his appointment as well as that accruing afterward.⁷⁸⁵ The rights of a receiver of a debtor appointed in supplementary proceedings prior to the commencement of an action against the debtor to foreclose a mortgage on the debtor's land, are inferior to those of a receiver in the foreclosure suit.⁷⁸⁶

— **Personal property.** It is the duty of the receiver, without any unreasonable delay, to convert all the personal estate and effects into money.⁷⁸⁷ He may, by leave of the court, sell desperate debts and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.⁷⁸⁸ Or he may be authorized to sell personal property at a private sale where it appears that a larger sum would probably be realized by selling in that way.⁷⁸⁹ But he should not sell all the debtor's interest in a large trust fund to satisfy a small judgment,⁷⁹⁰ nor should he be ordered to sell a cause of action of the judgment debtor on which an attorney had a lien prior to, and greater in amount than, the judgment.⁷⁹¹ He may sue to recover usurious payments made by the debtor.⁷⁹² The receiver acquires the legal title to policies of insurance on the life of the judgment debtor,

property of the judgment-debtor is vested in the receiver are not applicable, since it passed from the judgment-debtor by his conveyance which is void only as to creditors, who by the judgment acquire a lien on the property only.

⁷⁸⁴ *Vermont Marble Co. v. Wilkes*, 62 State Rep. 121, 30 N. Y. Supp. 381. Duty to enforce a lease by collecting rent, see *Matter of Witte*, 45 Misc. 336.

⁷⁸⁵ *Beamish v. Hoyt*, 25 Super. Ct. (2 Rob.) 307, 318.

⁷⁸⁶ Receiver in foreclosure suit is entitled to rents and profits. *Grover v. McNeely*, 72 App. Div. 575, 76 N. Y. Supp. 559.

^{787, 788} Rule 77 of General Rules of Practice.

⁷⁸⁹ *Monolithic Drain & Conduit Co. v. Dewsnap*, 25 Civ. Proc. R. (Scott) 380, 41 N. Y. Supp. 224.

⁷⁹⁰ *People v. McAdam*, 1 City Ct. R. 38, note.

⁷⁹¹ *Matter of Patterson*, 12 App. Div. 123, 76 State Rep. 495, 42 N. Y. Supp. 495.

⁷⁹² *Palen v. Bushnell*, 18 Abb. Pr. 301.

payable to him or his estate: and, where the debtor pays premiums after the appointment of a receiver and subsequently dies, the receiver may recover the amount due, not exceeding the amount of the debt he represents, and is not limited to the surrender value of the policies at the time of his appointment.⁷⁹³ So the fact that the receiver has no knowledge of policies on the life of the debtor which are subsequently kept alive by the judgment debtor, will not defeat his right to recover the amount falling due, on the debtor's death, notwithstanding an attempt by the latter to transfer the policies under circumstances amounting to a conversion.⁷⁹⁴ But where a husband pays out sums as premiums on a policy on his life in excess of five hundred dollars a year, a receiver is not such a creditor as is entitled to recover the amount paid in excess of five hundred dollars.⁷⁹⁵ Where personal property is levied on under execution after the appointment of a receiver, the debtor cannot be ordered to deliver it to the receiver but the receiver is left to his action against the sheriff.⁷⁹⁶ The receiver, as such, is not liable for a conversion where he takes possession of a certificate and collects the sum due thereon, where he acts in obedience to a lawful judicial mandate.⁷⁹⁷ An action against the debtor himself for conversion of property the title to which had vested in the receiver may be maintained by the receiver.⁷⁹⁸

— **Actions to set aside fraudulent conveyances.** The receiver may sue to set aside any fraudulent transfer of property by the judgment debtor.⁷⁹⁹ For the purpose of maintaining such actions he represents the creditor and possesses the same rights as the creditor under whose judgment he was appointed would himself have had.⁸⁰⁰ He can follow the fund or pro-

⁷⁹³, ⁷⁹⁴ *Reynolds v. Aetna Life Ins. Co.*, 160 N. Y. 635, 648.

⁷⁹⁵ *Masten v. Amerman*, 51 Hun, 244, 4 N. Y. Supp. 681.

⁷⁹⁶ *Griswold v. Tompkins*, 7 Daly, 214; *Becker v. Torrance*, 31 N. Y. 631.

⁷⁹⁷ *Ochs v. Pöhly*, 87 App. Div. 92, 84 N. Y. Supp. 1.

⁷⁹⁸ *Gardner v. Smith*, 29 Barb. 68.

⁷⁹⁹ *Wright v. Nostrand*, 94 N. Y. 31, 42; *Mandeville v. Avery*, 124 N. Y. 376, 385; *Whyte v. Denike*, 53 App. Div. 425, 65 N. Y. Supp. 1081.

⁸⁰⁰, ⁸⁰¹ *Mandeville v. Avery*, 124 N. Y. 376, 385.

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ceeds of the sale into the possession of any person not a bona fide owner or holder thereof.⁸⁰¹ But his recovery is limited to an amount sufficient to cover the judgment and costs.⁸⁰² The receiver cannot bring an action "at law" for the taking of property transferred before the recovery of judgment because neither the judgment creditor nor the judgment debtor could have brought it.⁸⁰³ He can, however, by a bill in equity, remove any obstacle, such as a fraudulent transfer, which, until set aside, would prevent him from taking possession of the property.⁸⁰⁴ Laws 1858, c. 314, as amended in 1894, entitled an act "to declare and extend the powers of executors, assignees, receivers and other trustees," does not apply to a receiver in supplementary proceedings.⁸⁰⁵ An assignment to the receiver is not a condition precedent to an action to set aside, on the ground of fraud, an assignment of real and personal property.⁸⁰⁶

The right to sue to set aside a fraudulent conveyance is not, however, exclusive of the right of other judgment creditors to sue:⁸⁰⁷ and a receiver appointed at the instance of other creditors after the commencement of an action by him to set aside a conveyance may commence a new action in order to recover on behalf of such creditors.⁸⁰⁸

— **Property covered by chattel mortgage.** The receiver cannot sell goods covered by a mortgage executed, and filed, before the service of the order for examination.⁸⁰⁹ So property covered by a past-due chattel mortgage will not be ordered to be delivered to the receiver.⁸¹⁰ So the receiver cannot main-

⁸⁰² *Bostwick v. Menck*, 40 N. Y. 383. A personal judgment cannot be rendered in an action by a receiver to set aside a fraudulent conveyance where no such relief is demanded in the complaint. *Harrison v. Obermeyer & Liebmann Brew. Co.*, 64 App. Div. 499, 72 N. Y. Supp. 270.

⁸⁰³ *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 183.

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.*; *Pettibone v. Drakeford*, 37 Hun, 628.

⁸⁰⁶ *Porter v. Williams*, 9 N. Y. (5 Seld.) 142, 12 How. Pr. 107.

⁸⁰⁷ *Gere v. Dibble*, 17 How. Pr. 21.

⁸⁰⁸ *Bostwick v. Menck*, 40 N. Y. 383.

⁸⁰⁹ *Manning v. Monaghan*, 14 Super. Ct. (1 Bosw.) 459.

⁸¹⁰ *Tinkev v. Largdon*, 13 Wkly. Dig. 384.

tain replevin against the mortgagee to obtain the possession of chattels mortgaged by the judgment debtor, where the mortgagee has reduced the chattels to possession.^{§11} The theory of these decisions is that the receiver takes merely the interest of the debtor. On the other hand, the title to mortgaged chattels, in the possession of the mortgagor, where the mortgage is not filed at the time of the service of the order for examination vests in the receiver;^{§12} and a receiver may maintain an action to set aside a chattel mortgage on the property of the debtor and to compel the mortgagee to account for the proceeds of the sale and pay over a sum sufficient to satisfy the judgment under which the receiver was appointed, where such mortgage was constructively fraudulent because of a want of change of possession of the mortgaged chattels and because of a failure to file the mortgage.^{§13} But where a chattel mortgagee sells under a mortgage neither filed nor accompanied by an immediate change of possession, the receiver cannot reach the proceeds by an action at law for conversion but must sue in equity to set aside the mortgage.^{§14} It has been held, however, that an action to set aside an unfilled chattel mortgage is not authorized by the statute providing that a receiver, among others, may disaffirm, treat as void, and resist, all acts done, and transfers and agreements made, in fraud of the rights of any creditor, because unfilled chattel mortgages are not transfers of property in fraud of the rights of creditors, within such statute.^{§15} It has also been held that a mortgage is not

^{§11} *Campbell v. Fish*, 8 Daly, 162.

^{§12} *Clark v. Gilbert*, 14 Wkly. Dig. 241, 10 Daly, 316. It is not sufficient that mortgage was filed before appointment of receiver. *Id.*; distinguishing *Gardner v. Smith*, 29 Barb. 74, as a case where mortgage was filed prior to the appointment of the receiver but was not refiled afterwards.

^{§13} *Mandeville v. Avery*, 124 N. Y. 376; *Stephens v. Perrine*, 143 N. Y. 476.

^{§14} *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; followed in *Brunnemer v. Cook & Bernheimer Co.*, 89 App. Div. 406, 85 N. Y. Supp. 954, which reviews the previous decisions. The latter case is affirmed by the court of appeals in 180 N. Y. 188.

^{§15} *Sheldon v. Wickham*, 161 N. Y. 500.

void as to the receiver of the judgment debtor because not refiled within the time prescribed by statute, since such mortgage is not void as to the mortgagor.⁸¹⁶

— **Action for accounting.** The receiver may sue for an accounting by a third person as to funds and securities of a judgment debtor in his possession and for a decree compelling him to pay and deliver them to the receiver.⁸¹⁷ So a receiver appointed in proceedings against a legatee may compel an accounting by the executor.⁸¹⁸

— **Rules relating to actions in general.** The receiver can bring no action except such as either the judgment creditor or the judgment debtor could have brought.⁸¹⁹ For instance, the receiver cannot sue to have a sale set aside on the ground of fraud where the judgment creditor could not do so because of an election of remedies by him.⁸²⁰ But it does not follow that the receiver may bring every action which the judgment creditor may bring. Thus, where a trust is created in favor of the creditors of one paying the consideration for lands conveyed to another, the receiver is not the representative of the creditor in respect to it.⁸²¹ So he does not represent the judgment creditor to the extent of bringing an action at law, even if the judgment creditor might have brought one, to recover damages for a fraudulent conspiracy to prevent the collection of his debt, carried into effect before the supplementary proceedings were commenced.⁸²²

Every receiver of the property and effects of a debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, de-

⁸¹⁶ *Steward v. Cole*, 43 Hun, 164, 4 State Rep. 428, 25 Wkly. Dig. 489.

⁸¹⁷ *Armstrong v. McLean*, 153 N. Y. 490, 498.

⁸¹⁸ *Matter of Beyea's Estate*, 10 Misc. 198, 63 State Rep. 602, 31 N. Y. Supp. 200. See, also, *Worrall v. Driggs*, 1 Redf. 449; *Matter of Sistare*, 2 Con. 544, 27 Abb. N. C. 34, 15 N. Y. Supp. 709.

⁸¹⁹ *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 182. Rules as to actions by receivers in general, see vol. 2, p. 1647. Can sue director for failure to file an annual report. *Boynton v. Sprague*, 100 App. Div. 443.

⁸²⁰ *Kennedy v. Thorp*, 51 N. Y. 174.

⁸²¹ *Underwood v. Sutcliffe*, 77 N. Y. 58.

⁸²² *Ward v. Petrie*, 157 N. Y. 301, 309.

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mands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character.⁸²³

The receiver, on applying for leave to bring an action, must present and file with his application the written request of the creditor in whose behalf he was appointed, that such action be brought, or else he shall give a bond with sufficient security and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. Leave to bring an action shall not be granted except on such written request or on the giving of such security.⁸²⁴ This rule was intended for the protection of the receiver as well as of adverse litigants.⁸²⁵ He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court or by the consent of all persons interested in the funds in his hands.⁸²⁶ He may also sue in the name of a debtor where it is necessary or proper for him to do so.⁸²⁷

In an action by a receiver he must show that he was properly appointed.⁸²⁸ But an allegation that plaintiff was duly appointed a receiver in supplementary proceedings is not demurrable.⁸²⁹ If the action by the receiver relates to real property, it must be shown that the order appointing the receiver was filed in the county where the land was located,⁸³⁰ and it

⁸²³ Rule 77 of General Rules of Practice.

⁸²⁴ Rule 78 of General Rules of Practice; *Millis v. Pentelow*, 92 Hun, 284, 72 State Rep. 333, 36 N. Y. Supp. 906. Receiver may be directed to pay the costs where he sues without leave of court. *Henry v. Randall*, 15 Wkly. Dig. 106.

⁸²⁵ *Matter of Castle*, 2 State Rep. 362.

⁸²⁶, ⁸²⁷ Rule 77 of General Rules of Practice.

⁸²⁸ *Wegman v. Childs*, 44 Barb. 403. Statement in complaint, see vol. 1, pp. 923, 924.

⁸²⁹ *Rockwell v. Merwin*, 45 N. Y. 166; *Manley v. Rassiga*, 13 Hun, 288. Complaint need not show that execution was issued to the county where the debtor resides. *Hyatt v. Dusenbury*, 12 Civ. Proc. R. (Browne) 152, 5 State Rep. 846; *Campbell v. Foster*, 35 N. Y. 361.

⁸³⁰ *Wright v. Nostrand*, 94 N. Y. 31, 43; *Dubois v. Cassidy*, 75 N. Y. 298.

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must be alleged that the judgment debtor owned the property at the time of the commencement of the special proceedings.⁸³¹ But while it is essential, in any action brought by a receiver, to show an appointment as such receiver, by a judge having jurisdiction to make it, yet it is not open to the party, in a collateral proceeding, to raise every question relating to the validity of such appointment.⁸³² In an action by the receiver against a third person ordered to pay or deliver, it must be shown that when the third person order was served on him he had in his possession or under his control personal property then belonging to the judgment debtor or that he then owed him a debt exceeding ten dollars in amount.⁸³³

An injunction to restrain the disposition of money should not be granted in an action by the receiver, unless the amount of the judgment is stated in the complaint or some allegation made showing grounds for equitable jurisdiction.⁸³⁴ An injunction will not be granted to a receiver to restrain an action to set aside a transfer of property, by a judgment creditor other than those he represents, where he has been guilty of laches.⁸³⁵

The receiver cannot recover more than the amount of the judgment and interest thereon, and the costs of the proceedings, and commissions and disbursements of the receiver.⁸³⁶

Decisions holding that the receiver ought not to employ the attorney of either the debtor or creditor⁸³⁷ have been overruled, and now it is held proper so to do.⁸³⁸

⁸³¹ *Dubois v. Cassidy*, 75 N. Y. 298, 302.

⁸³² *Wright v. Nostrand*, 94 N. Y. 31, 44; *Tyler v. Willis*, 33 Barb. 328; *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147.

⁸³³ *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 331.

⁸³⁴ *Hughes v. McKenzie*, 39 State Rep. 31, 14 N. Y. Supp. 352.

⁸³⁵ *First Nat. Bank of Rondout v. Navarro*, 43 State Rep. 813, 17 N. Y. Supp. 900.

⁸³⁶ *O'Connor v. Mechanics' Bank*, 54 Hun, 272, 27 State Rep. 1, 7 N. Y. Supp. 380; *Gifford v. Rising*, 59 Hun, 42, 35 State Rep. 695, 12 N. Y. Supp. 428.

⁸³⁷ *Cumming v. Egerton*, 22 Super. Ct. (9 Bosw.) 684; *Branch v. Harrington*, 49 How. Pr. 196.

⁸³⁸ *Baker v. Van Epps*, 60 How. Pr. 79, 22 Hun, 460. Employment of more than one counsel, see vol. 2, p. 1646.

Subject to the rules laid down in a preceding volume, the receiver may be substituted as a party,⁸³⁹ and he may intervene to protect his debtor's interest.⁸⁴⁰

The necessity of security for costs has been considered in a preceding volume.⁸⁴¹

— **Contest of probate of will.** A receiver of the property of a husband is not interested in the estate of the wife, so as to be entitled to contest a probate of her will, where the will divests the husband of all interest in the estate.⁸⁴²

— **When duties are terminated.** The duties of a receiver are ended when the judgment he is appointed to enforce is fully paid.

§ 2425. Obtaining possession of property.

The propriety of an order to pay money, or deliver personal property, to the receiver, has already been considered.⁸⁴³ If property is in the possession of the judgment debtor, the proper practice to bring him in contempt for failure to turn over property to a receiver is for the latter to procure, on proper proofs, an order requiring the judgment debtor to deliver the specific property, serve it upon the judgment debtor, following it by a proper demand for the articles specified in it. Merely serving a copy of the order appointing a receiver and then making the demand is not sufficient.⁸⁴⁴ If the property is such that it cannot be reached by an order to deliver or pay over, as where the right to possession is disputed,⁸⁴⁵ the receiver must bring an action. A receiver is not justified in taking

⁸³⁹ Wood v. Powell, 3 App. Div. 318, 73 State Rep. 689, 38 N. Y. Supp. 196; Fitzpatrick v. Moses, 34 App. Div. 242, 54 N. Y. Supp. 426. See vol. 2, p. 2074.

⁸⁴⁰ Matter of Patterson, 12 App. Div. 123, 76 State Rep. 495, 42 N. Y. Supp. 495. Right to intervene in general, see vol. 1, pp. 428-433.

⁸⁴¹ Volume 2, p. 1893.

⁸⁴² Matter of Brown's Will, 47 Hun, 360.

⁸⁴³ See ante, § 2395.

⁸⁴⁴ Fromme v. Jarecky, 19 Misc. 483, 43 N. Y. Supp. 1081.

⁸⁴⁵ See ante, § 2395.

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forcible possession of property in possession of a third person who claims to own it.⁸⁴⁶

§ 2426. Control over receiver.

The receiver becomes an officer of the "court."⁸⁴⁷ He is subject to the direction and control of the court out of which the execution was issued.⁸⁴⁸ If the judgment was a transcript from a justice court, filed in the county clerk's office, the receiver is subject to the direction and control of the county court.⁸⁴⁹ An accounting cannot be ordered by the "judge" who appoints the receiver,⁸⁵⁰ since his authority over him ceases with the appointment.⁸⁵¹ A court cannot make an order directing the application of funds in the hands of the receiver where the motion papers do not show in what court the judgment in the action in which he was appointed was obtained nor out of what court execution thereon was issued.⁸⁵²

Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of, the receiver, with respect to that judgment, remain in the court to whose control and direction he was originally subject.⁸⁵³ For instance, a receiver appointed by the supreme court and whose receivership is extended by the city court cannot be removed by a judge of the city court.⁸⁵⁴

—**Payments.** If other persons claim a fund in the hands of the receiver, he should apply to the court for directions,

⁸⁴⁶ *Dewey v. Finn*, 18 Wkly. Dig. 558. Can recover only in an action. *Brein v. Light*, 36 Misc. 110, 72 N. Y. Supp. 655.

⁸⁴⁷ *Smith v. Barnum*, 59 App. Div. 291, 69 N. Y. Supp. 253.

⁸⁴⁸ Code Civ. Proc. § 2471. But in *Wing v. Disse*, 15 Hun, 190, a case decided under the old Code, it was held that a county judge may accept the resignation of a receiver and appoint his successor. See *Tillotson v. Wolcott*, 48 N. Y. 188.

⁸⁴⁹⁻⁸⁵¹ *Pool v. Safford*, 14 Hun, 369.

⁸⁵² *Galster v. Syracuse Sav. Bank*, 29 Hun, 594.

⁸⁵³ Code Civ. Proc. § 2471.

⁸⁵⁴ *Garfield Nat. Bank v. Bostwick*, 39 State Rep. 358, 14 N. Y. Supp. 919.

as otherwise a payment over will be at his peril.⁸⁵⁵ An order against the receiver to pay back money paid to him or indemnify the person sued therefor against all costs, damages, and expenses, cannot be granted in an action in which neither the judgment debtor, the judgment creditor, nor the receiver, are parties.⁸⁵⁶

§ 2427. Application of proceeds.

Property should not be ordered to be applied to a judgment other than that under which the receiver was appointed or a judgment to which his receivership was extended.⁸⁵⁷ If the receivership has been extended, the proceeds should first be applied on the judgment under which an order for examination was first made.⁸⁵⁸ Where a receivership is extended to a prior judgment, no order for examination having been served on the judgment debtor by the junior creditor, but he having voluntarily appeared, the prior judgment creditor is entitled to priority of payment from the funds in the hands of the receiver.⁸⁵⁹ The fact that a receiver leaves property in possession of the debtor does not affect the priority gained by the creditor at whose instance the receiver was appointed.⁸⁶⁰ A receiver in a creditor's suit may maintain an action to have priorities determined upon conflicting claims made against the fund remaining in his hands after final judgment, and is not confined to his remedy by motion.⁸⁶¹ A receiver appointed in two different actions must apply rents collected to the judgment that is prior in point of time, where the property from which the rent is derived is the subject of a fraudulent con-

⁸⁵⁵ *Matter of Hone*, 153 N. Y. 522, 527; *Barnes v. Courtright*, 37 Misc. 60, 74 N. Y. Supp. 203.

⁸⁵⁶ *Gelster v. Syracuse Sav. Bank*, 17 Wkly. Dig. 137, 29 Hun, 594.

⁸⁵⁷ *Goddard v. Stiles*, 90 N. Y. 199, 206.

⁸⁵⁸ Note on priority of receiverships in supplementary proceedings, see 11 Ann. Cas. 360.

⁸⁵⁹ *Youngs v. Klunder*, 27 State Rep. 32, 7 N. Y. Supp. 498.

⁸⁶⁰ *Fessenden v. Woods*, 16 Super. Ct. (3 Bosw.) 550.

⁸⁶¹ *Bamberger v. Fillebrown*, 12 Misc. 328, 33 N. Y. Supp. 614.

veyance set aside in a creditor's suit by the prior judgment creditor but the one last instituting proceedings.⁸⁶²

§ 2428. **Compensation.**

Compensation of the receiver may be fixed by the court, and is not limited by any statute.⁸⁶³

⁸⁶² Phillips v. O'Connor, 1 City Ct. R. 372.

⁸⁶³ Baldwin v. Eazler, 34 Super. Ct. (2 J. & S.) 274.

CHAPTER V.

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ART. I. DEFINITION, NATURE, AND CLASSIFICATION.

§ 2429. Code definition.

A “judgment creditor’s action” is defined by the Code as an action brought as prescribed in article one of title four of chapter fifteen of the Code, or any other action, brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money.¹

§ 2430. Classification of actions.

In order to understand the rules relating to the actions now under consideration, it is necessary to classify the actions, since the rules relating to certain kinds of creditors’ suits do not apply to other kinds. Furthermore certain actions are often referred to as judgment creditors’ actions which are in reality actions by simple contract creditors.

—— (1) **Actions to reach property not subject to execution.** There are two kinds of creditors’ suits to reach property not subject to execution. The one is regulated entirely by the

¹ Code Civ. Proc. § 3343, subd. 14.

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Code and the other in part by section 78 of the Real Property Law.

Sections 1871 to 1879 of the Code relate to creditors' suits as regulated by the Code. The Code provisions apply only to creditors' bills strictly, where the only claim to relief is that the remedy at law is exhausted. They leave untouched the common-law powers in reference to fraudulent trusts and conveyances.² Section 1871 of the Code provides, *inter alia*, as follows: "The judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of any thing in action or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand." Section 1878 provides as follows: "A discovery may be compelled in an action, * * * by directing the person, required to make it, to appear before the court, or a referee appointed by it, and to be examined under oath, concerning the matters pertaining to the discovery. But this section does not affect the right of the plaintiff, to cause the deposition of a defendant to be taken, as prescribed in article first of title third of chapter ninth of this act." A discovery is ordinarily obtained, however, by supplementary proceedings.³ In this class of Code actions it is always necessary to obtain a judgment, to issue execution to the proper county as provided for in section 1873 of the Code, and to have the execution returned wholly or partly unsatisfied prior to the commencement of suit.⁴

Section 78 of the Real Property Law provides as follows:

² *Chautauque County Bank v. White*, 6 N. Y. (2 Seld.) 236, 252.

³ But notwithstanding the relief afforded by the Code to a judgment creditor by supplementary proceedings, his right to an action upon grounds which formerly would have sustained a creditor's bill to obtain discovery of property concealed, withheld and transferred in fraud of creditors, is still preserved. *Hart v. Albright*, 28 Abb. N. C. 74, 18 N. Y. Supp. 718.

⁴ See post, §§ 2436-2447.

“Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution.”⁵ This statute authorizes a creditor’s suit to reach property not subject to execution. It provides for a creditor’s suit proper, with the obtaining of judgment and issuance and return of execution as a condition precedent.⁶

— (2) **Actions in aid of an execution.** The second class of cases to be considered are often termed “actions in the nature of creditors’ suits.” They are “in the nature” of creditors’ suits because ordinarily an execution, though it must be issued, need not be returned before commencing the suit. A return is necessary where the action is brought to reach assets not subject to execution but not where the action is merely to remove an obstruction to the enforcement of a judgment against property which is subject to execution.⁷ This class of actions in aid of an execution, to remove an obstruction to the enforcement of the execution, depend on the established rules of courts of equity, as distinguished from the Code rules.⁸ The creditor is not obliged to resort to the remedy prescribed by the Code. He may, notwithstanding its enactment, bring an action under the general equitable authority of the court in aid of his execution, to remove such unlawful dispositions of the debtor’s property as may render

⁵ For a construction of this statute, see post, § 2436, subd. 2; § 2454. Complaint, see post, § 2468. Variance, see post, § 2470. Lien, see post, § 2475, last sentence. Judgment, see post, § 2491.

⁶ See post, § 2454.

⁷ If it only appear that there is a fund not leviable, which should be applied, the complaint should be dismissed. *McCaffrey v. Hickey*, 66 Barb. 489.

⁸ *Easton Nat. Bank v. Buffalo Chemical Works*, 48 Hun, 557, 561, 1 N. Y. Supp. 250; *Koechl v. Leibinger & Oehm Brew. Co.*, 26 App. Div. 573, 579, 50 N. Y. Supp. 568; *Creteau v. Foote & Thorne Glass Co.*, 54 App. Div. 168, 172, 66 N. Y. Supp. 370; *Stetson v. Hopper*, 60 App. Div. 277, 70 N. Y. Supp. 170.

the execution, while they exist, ineffectual. The action is usually brought to set aside a fraudulent conveyance. Judgment creditors, in pursuing their remedy against lands fraudulently conveyed, have the choice of three proceedings. They may sell on execution and leave the purchaser, after the title becomes perfect by sheriff's deed, to contest defendant's title in an action of ejectment; or, second, after issuing execution they may sue to remove the fraudulent obstruction and await the result of the action before selling; or, third, they may, after execution unsatisfied, bring a creditor's suit and procure a sale by a receiver or other officer, and an application of the proceeds.⁹ Plaintiff may sell the lands on execution pending the action without affecting his right to proceed with the action to obtain a judgment removing the cloud on title.¹⁰

Where there has been a fraudulent disposition of the debtor's property, plaintiff may either (1) sue after the return of an execution unsatisfied and have a receiver appointed to take possession of the debtor's property, or (2) sue after the issue but before the return of the execution to set aside the obstructions to the execution and then proceed to sell under the execution without the appointment of any receiver.¹¹

The right to have obstructions removed is not limited to cases of fraud but reaches any case where the obstruction is improper. For instance, the judgment creditor of an heir of one who in his lifetime, while non compos mentis, executed a conveyance of real estate, may maintain an action, in aid of

⁹ *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166; *Hillyer v. Le Roy*, 179 N. Y. 369, 376. Fraudulent mortgage. *Guilford v. Mills*, 44 State Rep. 358, 18 N. Y. Supp. 275. The creditor may, but is not bound to, file a bill to set aside the conveyance. *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Bergen v. Carman*, 79 N. Y. 146; *Fuller v. Brown*, 76 Hun, 557, 28 N. Y. Supp. 189. In either case, it must be shown that the conveyance was made to defraud creditors, was executed in bad faith, and left the judgment debtor insolvent. *Maders v. Whallon*, 74 Hun, 372, 56 State Rep. 327, 26 N. Y. Supp. 614. The existence of a remedy by execution is not a bar to a creditor's bill when it is claimed that the property belonged to others. *Gillett v. Staples*, 16 Hun, 587.

¹⁰ *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166.

¹¹ See *Bowe v. Arnold*, 31 Hun, 256.

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his judgment, to set aside the conveyance.¹² And a creditor's suit will lie to set aside a chattel mortgage made by the judgment debtor which is void for want of filing, and this without first obtaining the appointment of a receiver in supplementary proceedings.¹³ So the obstruction need not be a fraudulent "conveyance." Thus, an action in aid of an execution may be brought to set aside a preceding fraudulent judgment.¹⁴ "Personal" property fraudulently transferred may be reached as well as "real" property,¹⁵ but where property transferred to defendant by a bill of sale is entirely destroyed by fire while still in the assignor's possession, an action does not lie to set aside the bill of sale as in fraud of creditors.¹⁶

To entitle a plaintiff to maintain an action to set aside the conveyance of his debtor, it is essential that he should establish his character as judgment creditor of the fraudulent grantor, and the fact that the conveyances challenged as fraudulent were so in fact, and stood in the way of the collection of his judgment.¹⁷ But a specific finding that a defendant was insolvent at the date of an assignment is not necessary to support a judgment setting it aside as not made in good faith where his fraudulent intent is found as a fact.¹⁸ If it does not appear that any determination of the court as to the validity of the incumbrances would enable plaintiffs to subject the property to sale, the action cannot be sustained as a bill to remove obstructions to the remedy at law.¹⁹ Equity has jurisdiction to set aside a fraudulent conveyance of lands situated

¹² Booth v. Fuller, 35 App. Div. 117, 54 N. Y. Supp. 670.

¹³ The judgment creditor can take the same proceedings as to personal, as to real, property, and it matters not whether the conveyance is invalid because fraudulent or invalid for any other cause. Webb v. Staves, 1 App. Div. 145, 37 N. Y. Supp. 414.

¹⁴ Easton Nat. Bank v. Buffalo Chemical Works, 48 Hun, 557, 1 N. Y. Supp. 250.

¹⁵ McClosky v. Stewart, 63 How. Pr. 137.

¹⁶ Putzel v. Schulhof, 59 Super. Ct. (27 J. & S.) 88, 13 N. Y. Supp 231.

¹⁷ Carpenter v. Osborn, 102 N. Y. 552, 558.

¹⁸ Vollkommer v. Cody, 177 N. Y. 124, 130.

¹⁹ Crippen v. Hudson, 13 N. Y. (3 Kern.) 161.

without the state.²⁰ A creditor may sue to set aside an alleged fraudulent conveyance although a judgment in an action between the parties to the conveyance or mortgage has affirmed the validity of the deed or mortgage.²¹

Section 74 of the Real Property Law provides, *inter alia*, as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands."²² An action by a creditor to enforce such trust is not an ordinary creditor's action within the rule that plaintiff must show his remedy at law to be exhausted by the return of an execution wholly or partly unsatisfied.²³

— (3) **Actions against insolvent estate by persons not holding judgments.** Actions brought pursuant to section seven of the Personal Property Law or section two hundred and thirty-two of the Real Property Law by representatives, or by the creditors, of an insolvent estate, in which cases no judgment is required as a condition precedent, while not even in the nature of "judgment" creditors' suits,²⁴ are so often referred to as creditors' suits, that it has been deemed proper to consider such actions in a separate article in this chapter.²⁵

— (4) **Actions in aid of an attachment.** An action by a sheriff in aid of an attachment, which is in the nature of a creditor's suit, has been treated of in a preceding volume.²⁶

§ 2431. Action against domestic corporation.

The Code article as to creditors' suits does not apply to a

²⁰ *Kirdahi v. Basha*, 36 Misc. 715, 74 N. Y. Supp. 383.

²¹ *Brooks v. Wilson*, 125 N. Y. 256, 263.

²² For application of this statute, see post, § 2436, subd. 3; § 2455.

²³ That such actions are not, strictly speaking, creditors' suits, see *Fox v. Moyer*, 54 N. Y. 125, and *McCartney v. Bostwick*, 32 N. Y. 53.

²⁴ *West Troy Nat. Bank v. Levy*, 127 N. Y. 549.

²⁵ See post, §§ 2498-2505.

²⁶ Volume 2, pp. 1493-1498.

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case where the judgment debtor is a corporation created by or under the laws of this state,²⁷ but this does not preclude an action in equity, not based on the Code, against such a corporation.²⁸ Where an execution against a corporation is returned unsatisfied, the creditor may sequester, under section 1784 of the Code, or may proceed, under the general equitable jurisdiction of the court, to set aside the fraudulent conveyance.²⁹

§ 2432. Election of remedies.

A creditor's suit is brought to aid the collection of a judgment. The question arises as to when a resort to another remedy will preclude the commencement, or the further continuance, of a creditor's suit. The issuance of a second execution is not an election,³⁰ nor is a sale of the lands on the first execution, pending the suit to remove an obstruction to the enforcement of the judgment.³¹ The action is not defeated by obtaining a judgment on the first judgment.³² So a creditor's suit and supplementary proceedings are concurrent remedies and both may be prosecuted where no abuse is shown.³³ And a mortgagee having judgment at law on the bond may proceed thereon by creditor's bill without foreclosing the mortgage, except where, by sale on execution, or otherwise, the land has been transferred and become the primary fund for the payment of the debt.³⁴

§ 2433. Whether action based on contract.

A creditor's suit is not an action based on contract.³⁵

²⁷ Code Civ. Proc. § 1879.

²⁸ *Easton Nat. Bank v. Buffalo Chemical Works*, 48 Hun, 557, 1 N. Y. Supp. 250; *Creteau v. Foote & Thorne Glass Co.*, 54 App. Div. 168, 171, 66 N. Y. Supp. 370.

²⁹ *Home Bank v. J. B. Brewster & Co.*, 15 App. Div. 338, 44 N. Y. Supp. 54.

³⁰ See post, § 2446.

³¹ *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166.

³² *Bates v. Lyons*, 7 Paige, 85.

³³ *Gates v. Young*, 17 Wkly. Dig. 551.

³⁴ *Palmer v. Foote*, 7 Paige, 437.

³⁵ *Albro v. Rood*, 24 Hun, 72.

§ 2434. **Leave to sue.**

A creditor's suit is not an action on a judgment, within the Code provision which forbids actions on judgments without leave of court.³⁶

ART. II. CONDITIONS PRECEDENT AND PROCEDURE IN ACTIONS BY "JUDGMENT" CREDITORS.**(A) SCOPE OF ARTICLE.**

§ 2435. This article includes questions relating to conditions precedent and procedure in the actions brought by "judgment" creditors.

(B) EXHAUSTION OF REMEDY AT LAW.§ 2436. **Necessity in general.**

The general rule is that the remedy at law must be exhausted before resort is had to a creditor's action.³⁷ This means not only that plaintiff must recover a judgment and issue an execution but also that such execution must be returned wholly or partly unsatisfied. An action which may be maintained, without such steps being taken, is not, strictly speaking, a creditor's action, and is often referred to as an action "in the nature of a creditor's action." The necessity for exhausting the remedy at law will be treated of in this section according to the nature of the creditor's action.

1. If the creditor's suit is based on the Code provisions, the Code expressly requires the obtaining a judgment and the issuance and return of execution against property, as a condition precedent to maintaining the action.³⁸ Such conditions precedent cannot be dispensed with in such an action though

³⁶ *Dunham v. Nicholson*, 4 Super. Ct. (2 Sandf.) 636.

³⁷ *Geery v. Geery*, 63 N. Y. 252; *Burnett v. Gould*, 27 Hun, 366; *Cornell v. Savage*, 49 App. Div. 429, 63 N. Y. Supp. 540; *Montgomery v. Boyd*, 60 App. Div. 133, 137, 70 N. Y. Supp. 139.

³⁸ Code Civ. Proc. §§ 1871, 1872. *Mechanics' & Traders' Bank v. Dakin*, 51 N. Y. 519; *Kerr v. Dildine*, 6 State Rep. 163, 26 Wkly. Dig. 70; *Harvey v. Brisbin*, 143 N. Y. 151.

it may be made to appear by evidence that no benefit would result to the creditor from them.³⁹

2. If the creditor's suit is to reach the surplus income of a trust, the same conditions precedent are necessary, and they cannot be dispensed with under any considerations.⁴⁰ At any event, it is no excuse for not recovering judgment and issuing execution that the action to recover a money judgment was enjoined during its pendency by an order in bankruptcy proceedings against the debtor, where such order is not clearly shown to have been made without the creditor's procurement or consent, and where it is not shown that he made any reasonable effort to vacate or modify the injunction order.⁴¹

3. If the action is brought to enforce a resulting trust, as authorized by section seventy-four of the Real Property Law,⁴² the remedy at law must be exhausted.⁴³

4. If the action is based on the allegation that the debtor possesses property which, in its nature, is liable to seizure and sale on execution, but that by fraudulent incumbrances on, or conveyances of, the same, the execution cannot be enforced, and the aid of chancery is invoked to remove the conveyances or incumbrances so that the process at law may be effectually enforced, it is indispensable that the execution should have been issued but not that it should have been returned;⁴⁴ though

³⁹ *Estes v. Wilcox*, 67 N. Y. 264; *Adsit v. Butler*, 87 N. Y. 585.

⁴⁰ It is immaterial that the beneficiary of the trust is without the jurisdiction of the court. *Dittmar v. Gould*, 60 App. Div. 94, 69 N. Y. Supp. 708. In this case the question as to the necessity of a judgment and execution returned unsatisfied is exhaustively considered in the able opinions of McLaughlin, J., and Van Brunt, P. J. There are dissenting opinions by O'Brien, J., and Ingraham, J. See, also, *Butler v. Baudouine*, 84 App. Div. 215, 82 N. Y. Supp. 773, which holds that trustee in bankruptcy, not being a "judgment" creditor, cannot reach surplus.

⁴¹ *Brown v. Barker*, 68 App. Div. 592, 599, 74 N. Y. Supp. 43.

⁴² See ante, § 2430, subd. 2, last paragraph.

⁴³ *Mandeville v. Campbell*, 45 App. Div. 512, 61 N. Y. Supp. 443.

⁴⁴ *Chautauque County Bank v. White*, 6 N. Y. (2 Seld.) 236, 252; *McElwain v. Willis*, 9 Wend. 548; *Steffin v. Steffin*, 4 Civ. Proc. R. (Browne) 179; *Bostwick v. Scott*, 40 Hun, 212, 215; *Easton Nat. Bank*

where, in an action by more than one creditor or where the action is brought by one in behalf of all, a receivership of the debtor's property is demanded, then it would seem that the return of an execution wholly or partly unsatisfied is a condition precedent. In the former case, a return, it has been held, is fatal to the relief sought,⁴⁵ but it would seem that this rule is limited to personal property sought to be reached.⁴⁶ Execution must be "issued," even where a vain and useless act, in actions to set aside a fraudulent conveyance.⁴⁷ But there is a line of cases holding that, where it is sought to set aside a conveyance as fraudulent, the prerequisites of a judgment and execution returned unsatisfied may be dispensed with where the situation is such as to render it impossible for plaintiff to recover a judgment on which execution could be issued.⁴⁸ But the failure to secure a judgment is not excused by the fact that defendant kept himself concealed out of the state to avoid service,⁴⁹ nor because of the fact that the appointment of a receiver is necessary to preserve property from misappropriation and waste pending litigation,⁵⁰ nor because the debtor is an insolvent corporation and has conveyed its property in violation of the statute.⁵¹

v. Buffalo Chemical Works, 48 Hun, 557, 1 N. Y. Supp. 250. See, also, Stetson v. Hopper, 60 App. Div. 277, 70 N. Y. Supp. 170.

⁴⁵ Mechanics' & Traders' Bank v. Dakin, 51 N. Y. 519, 522; Adsit v. Butler, 87 N. Y. 585, 587.

⁴⁶ This is on the theory that the lien on real estate fraudulently conveyed is created by the docketing of the judgment but that there is no lien on personal property except when execution is issued and that a return of the execution terminates such lien. Buswell v. Lincks, 8 Daly, 518. See, also, Royer Wheel Co. v. Fielding, 31 Hun, 274; Booth v. Fuller, 35 App. Div. 117, 54 N. Y. Supp. 670.

⁴⁷ Adsit v. Butler, 87 N. Y. 585. There is no distinction in this respect between judgments at law and in equitable actions. Geery v. Geery, 63 N. Y. 252.

⁴⁸ National Tradesmen's Bank v. Wetmore, 124 N. Y. 241; followed in Patchen v. Rofkar, 12 App. Div. 475, 42 N. Y. Supp. 35, 52 App. Div. 367, 65 N. Y. Supp. 122; Le Fevre v. Phillips, 81 Hun, 232, 30 N. Y. Supp. 709.

⁴⁹ Sloan v. Waring, 55 How. Pr. 62, which held, however, that complaint should not be dismissed.

^{50, 51} Adea v. Bigler, 81 N. Y. 349.

§ 2437. Exhaustion of remedy against several defendants.

It has been held that where the claim is against joint debtors, judgment must be recovered against all of them, including the estate of the deceased.⁵² It has also been held that where a creditor sues joint debtors and recovers judgment against one, he is not obliged to prosecute the suit to judgment against the other before bringing a creditor's action, but he may do so at once upon the issue and return unsatisfied of an execution against the judgment debtor.⁵³ The true rule seems to be that a judgment recovered on service of the summons on one of two persons jointly liable, followed by an execution against the joint property returned *nulla bona*, is sufficient to support an action by the judgment creditor to set aside an assignment by the joint debtors as fraudulent and to reach joint assets;⁵⁴ but that the separate property of the defendant not served cannot be reached.

If the liability is several, or joint and several, judgment need not be obtained against the other persons liable before bringing a creditor's suit against the debtor as against whom the remedy at law has been exhausted. For instance, where judgment has been obtained against one partner on a note signed by the firm and indorsed by a third person, and the remedy at law against him has been exhausted, an action to set aside a conveyance by him as fraudulent may be maintained without attempting to enforce the remedy at law against the other parties to the note.⁵⁵ So a judgment creditor may maintain an action to reach assets belonging to the estate of one of the deceased partners against whom he has recovered judgment without showing that he has exhausted his remedy at law against the survivor.⁵⁶

If defendants are jointly liable, and a judgment has been recovered on service of summons on all of them, the remedy

⁵² *Voorhees v. Howard*, 4 Abb. Ct. App. Dec. 503, 4 Keyes, 371.

⁵³ *Hiler v. Hetterick*, 5 Daly, 33; *Billhofer v. Heubach*, 15 Abb. Pr. 143.

⁵⁴ *King v. Baer*, 31 Misc. 308, 64 N. Y. Supp. 228.

⁵⁵ *Clarkson v. Dunning*, 22 State Rep. 73, 4 N. Y. Supp. 430.

⁵⁶ *Tuthill v. Goss*, 69 State Rep. 454, 35 N. Y. Supp. 136.

by execution must be exhausted against all the defendants before resorting to equity.⁵⁷ If only a part have been served with summons, an execution must be issued against the joint property of all and against the separate property of those served, and then, if that is ineffectual, a creditor's action will lie to reach any property belonging to any of the joint debtors and also the separate property of all except those not served.⁵⁸

If separate judgments are recovered against persons jointly and severally liable, the remedy at law need not be exhausted on all the judgments before proceeding against the judgment debtor against whose property the remedy at law has been exhausted.⁵⁹

A judgment against a person as an individual will not support a creditor's suit to reach firm assets.⁶⁰

The rules laid down in this section are all subject to this exception, i. e., if a defendant is a mere surety, the remedy at law need not be exhausted as against him.⁶¹

§ 2438. Supplementary proceedings as condition precedent.

Supplementary proceedings are not a condition precedent to a creditor's suit.⁶²

§ 2439. Imprisonment under body execution.

A creditor who has taken the debtor under a body execution cannot bring a creditor's suit while the debtor is confined thereunder.⁶³

⁵⁷ Child v. Brace, 4 Paige, 309, 316.

⁵⁸ Billhofer v. Heubach, 15 Abb. Pr. 143; Field v. Chapman, 15 Abb. Pr. 434; Field v. Hunt, 24 How. Pr. 463.

⁵⁹ Austin v. Figueira, 7 Paige, 56.

⁶⁰ Lewishon v. Drew, 15 Hun, 467.

⁶¹ Speiglemyer v. Crawford, 6 Paige, 254; Baker v. Potts, 73 App. Div. 29, 76 N. Y. Supp. 406.

⁶² Pope v. Cole, 55 N. Y. 124.

⁶³ Stilwell v. Van Epps, 1 Paige, 615.

§ 2440. Kind of judgment.

The judgment must be a money judgment but it is immaterial that it was rendered in an equitable action.⁶⁴

— **Judgment in rem.** A judgment in rem is not sufficient to sustain the action since no execution can be issued thereon.⁶⁵

— **Judgment of federal court or of foreign court.** A foreign judgment or a judgment of a court of the United States is not such a judgment as will support the action.⁶⁶

— **Judgment of justice of the peace.** A justice's judgment must be docketed in the county clerk's office and an execution issued on the transcript of the judgment. An action cannot be sustained upon a justice's judgment not docketed with the county clerk, even after execution, issued by the justice, and returned nulla bona.⁶⁷

§ 2441. Time of recovery of judgment.

A judgment recovered after the service of the complaint, and before answer, is insufficient.⁶⁸

§ 2442. Judgment against executor.

A decision of the court of appeals that a judgment recovered against an executor was not sufficient to enable the creditor to sue to set aside a fraudulent conveyance by the testator⁶⁹ does not state the present law since, in such a case, since 1889, a creditor without judgment may sue to set aside the conveyance.⁷⁰

⁶⁴ *Geery v. Geery*, 63 N. Y. 252, 257.

⁶⁵ So held where judgment was obtained against a nonresident, on attachment of its property. *Thomas v. Merchants' Bank*, 9 Paige, 216; *Capital City Bank v. Parent*, 134 N. Y. 527.

⁶⁶ *Tarbell v. Griggs*, 3 Paige, 207. Where the creditor has recovered a judgment in another state, his right to sue to set aside a deed in this state does not accrue until the recovery of judgment here. *Weaver v. Haviland*, 68 Hun, 376, 52 State Rep. 311, 22 N. Y. Supp. 1012.

⁶⁷ *Henderson v. Brooks*, 3 T. & C. 445; *Crippen v. Hudson*, 13 N. Y. (3 Kern.) 161.

⁶⁸ *Brinkerhoff v. Brown*, 4 Johns. Ch. 671.

⁶⁹ *Lichtenberg v. Herdtfelder*, 103 N. Y. 302.

⁷⁰ See post, §§ 2498-2505.

§ 2443. Docketing of judgment.

The judgment on which the action is based must be docketed, irrespective of whether it awards legal or equitable relief.⁷¹ Furthermore, it must be docketed while the judgment debtor is living. Filing a transcript in the county clerk's office, after the death of the judgment debtor, does not create a lien on his real estate so as to be the foundation of a creditor's suit.⁷² But the judgment need not be docketed in the county where the land is situated and the action is brought, if it is docketed in the county where defendant resides.⁷³

If the action is based on a justice's judgment, a transcript must have been filed in the county clerk's office.⁷⁴

§ 2444. Proceeding on two or more judgments.

A creditor having two judgments against his debtor, one taken before and the other after the appointment of a receiver in supplementary proceedings against such debtor, may bring a creditor's suit on them both to set aside a fraudulent mortgage.⁷⁵ So one who is a judgment creditor of a member of a firm, individually, and also of the firm, may base his action on both judgments, where he sues to set aside an assignment of the individual property of each member of the firm and also of the partnership property.⁷⁶

§ 2445. Existence and validity of judgment.

The judgment must actually exist though its validity cannot be collaterally attacked except where void.

⁷¹ *Geery v. Geery*, 63 N. Y. 252. Inasmuch as a judgment must be docketed before an execution can issue, this rule would seem to necessarily follow from the rule that an execution must be issued. *Kamp v. Kamp*, 46 How. Pr. 143.

⁷² *Henderson v. Brooks*, 3 T. & C. 445.

⁷³ *Lanahan v. Caffrey*, 40 App. Div. 124, 57 N. Y. Supp. 724; *Shaw v. Dwight*, 27 N. Y. 244.

⁷⁴ See ante, § 2440.

⁷⁵ *Gere v. Dibble*, 17 How. Pr. 31.

⁷⁶ *Genesee County Bank v. Bank of Batavia*, 43 Hun, 295.

— **Collateral attack.** The judgment cannot be attacked collaterally⁷⁷ except where it is void as where there is fraud in recovering it.⁷⁸

— **Appeal from judgment.** The taking of an appeal from plaintiff's judgment may be set up as a defense, if there has been a stay of proceedings.⁷⁹

— **Effect of opening judgment.** If defendant is let in to defend the action at law, leaving the judgment to stand as a security, the proceedings in equity should be stayed until the final decision at law.⁸⁰ If the judgment is set aside in the court where it was recovered, the complaint must be dismissed.⁸¹

§ 2446. Issuance of execution.

The action may be based on the return of an execution unsatisfied, notwithstanding the issuance of a second execution,⁸² unless it appears that the sheriff has levied, or can levy, on property sufficient to satisfy the judgment.⁸³ The assignee of a judgment on which an execution has been returned unsatisfied need not issue a new one before bringing the action.⁸⁴ So, notwithstanding five years have elapsed

⁷⁷ *Decker v. Decker*, 108 N. Y. 128, 134. But see *O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206, where a question is raised as to whether a judgment by confession cannot be inquired into.

⁷⁸ *Richardson v. Trimble*, 38 Hun, 409, 17 Abb. N. C. 210; *Carpenter v. Osborn*, 102 N. Y. 552, 557.

⁷⁹ So held as to writ of error. *Smith v. Crocheron*, 2 Edw. Ch. 501.

⁸⁰ *Drew v. Dwyer*, 1 Barb. Ch. 101.

⁸¹ Plaintiff cannot proceed by supplemental complaint on another judgment recovered in the interim. *Butchers' & Drovers' Bank v. Willis*, 1 Edw. Ch. 645.

⁸² A second execution, issued after filing the bill, and a levy on property insufficient to satisfy the judgment, is a satisfaction pro tanto only, and will not bar the creditor's bill generally. *Cuyler v. Moreland*, 6 Paige, 273. The court will not compel the creditor to elect between his bill and second execution, unless it is shown that in each case, if he succeeds, he will obtain his whole debt. *Storm v. Badger*, 8 Paige, 130.

⁸³ *Thomas v. McEwen*, 11 Paige, 131.

⁸⁴ *Gleason v. Gage*, 7 Paige, 121; *Hastings v. Palmer*, Clarke Ch. 52;

since the return, the action may be sustained without issuing a new execution.⁸⁵

— **Time.** An execution issued after the commencement of the suit is insufficient.⁸⁶

— **Issuance out of court of record.** The execution must be issued out of a court of record.⁸⁷ A justice's execution, which runs against personal property only, does not exhaust the remedy. The judgment should be docketed, and execution against real as well as personal property issued.⁸⁸

— **To what county.** "To entitle the judgment creditor to maintain an action, * * * the execution must have been issued as follows:

1. If, at the time of the commencement of the action, the judgment debtor is a resident of the state, to the sheriff of the county where he resides.

2. If he is not then a resident of the state, to the sheriff of the county where he has an office, for the regular transaction of business in person: or, if he has no such office within the state, to the sheriff of the county where the judgment roll is filed, unless the execution was issued out of a court other than the court in which the judgment was rendered, in which case: it must have been issued to the sheriff of the county where a transcript of the judgment is filed."⁸⁹

Execution need not be issued to a county where lands belonging to the debtor are located but it is sufficient that execution be issued to the county of his residence.⁹⁰

This Code provision closely corresponds to section 2458 of the Code which relates to the issuance of execution as a con-

McArthur v. Hoysradt, 11 Paige, 495; Strange v. Longley, 3 Barb. Ch. 650; overruling Wakeman v. Russel, 1 Edw. Ch. 509.

⁸⁵ Corning v. Stebbins, 1 Barb. Ch. 589.

⁸⁶ McCullough v. Colby, 18 Super. Ct. (5 Bosw.) 477.

⁸⁷ Code Civ. Proc. § 1871.

⁸⁸ Dix v. Briggs, 9 Paige, 595; Crippen v. Hudson, 13 N. Y. (3 Kern.) 161.

⁸⁹ Code Civ. Proc. § 1872.

⁹⁰ Shaw v. Dwight, 27 N. Y. 244; Lanahan v. Caffrey, 40 App. Div. 124, 57 N. Y. Supp. 724.

dition precedent to supplementary proceedings, except that, as a condition to supplementary proceedings, the execution must be issued against a resident "either" to the county where he resides "or" to the county where he has an office for the regular transaction of business, at the time of the commencement of the supplementary proceedings.⁹¹

This Code section does not apply to actions where, under the inherent equitable jurisdiction of the court, fraudulent transfers may be attacked without the return of an execution.

—**Effect of irregularity in execution.** It is no defense that the execution is irregular,⁹² though it is a defense that the execution is void, as where there is no judgment which would authorize an execution,⁹³ or where execution is issued after the death of the debtor without notice to his representatives or leave of court.⁹⁴ But where execution is issued, without leave of court, more than five years after the entry of judgment, the execution is merely voidable and not void.⁹⁵

§ 2447. Return of execution.

The necessity for a return has already been considered.⁹⁶ If executions have been issued to two or more counties, all must be returned unless the complaint shows it to be unnecessary.⁹⁷

—**Time.** It is not objectionable that the action is commenced after a return in good faith of nulla bona, though made before the expiration of the sixty days within which a return must be made.⁹⁸ The return, where necessary, must be

⁹¹ For construction of section 2458 of the Code, see ante, § 2287.

⁹² Produce Bank v. Morton, 67 N. Y. 199; Williams v. Hogeboom, 8 Paige, 469; Green v. Burnham, 3 Sandf. Ch. 110. Execution made returnable in less than sixty days. Rider v. Mason, 4 Sandf. Ch. 351.

⁹³ Bank of Rochester v. Emerson, 10 Paige, 115.

⁹⁴ Prentiss v. Bowden, 145 N. Y. 342.

⁹⁵ Aultman & Taylor Co. v. Syme, 163 N. Y. 54; reversing 23 App. Div. 344, 48 N. Y. Supp. 231, which held the contrary.

⁹⁶ See ante, § 2430.

⁹⁷ Willis v. Moore, Clarke Ch. 150.

⁹⁸ Renaud v. O'Brien, 35 N. Y. 99; Forbes v. Waller, 25 N. Y. 430.

before the commencement of the suit but an indorsement by a deputy sheriff upon an execution, after more than sixty days from its issuance, of a return of no property, and a delivery by him to the officer in charge of the sheriff's office to be filed, is a sufficient return of the execution to sustain a creditor's suit commenced on that day, although the return be not filed with the county clerk until the next day.⁹⁹

— **Sufficiency.** Execution must be returned and filed with the clerk of the court out of which it issued,¹⁰⁰ but if the action is in the supreme court the fact that the execution has been returned to the wrong clerk's office is a mere irregularity which is no defense.¹⁰¹ The usual return to an execution against joint debtors, one of whom was not served with process, that defendants had no goods, etc., is sufficient foundation for a creditor's action against all.¹⁰²

— **False return of nulla bona.** A false return of nulla bona is no defense.¹⁰³

(C) PROPERTY WHICH MAY BE REACHED.

§ 2448. In general.

The action can reach only property belonging to, or things in action due to, the debtor, or held in trust for him,¹⁰⁴ or

⁹⁹ *Iselin v. Henlein*, 16 Abb. N. C. 73.

¹⁰⁰ *Winslow v. Pitkin*, 1 Barb. Ch. 402.

¹⁰¹ *Clark v. Dakin*, 2 Barb. Ch. 36.

¹⁰² *Austin v. Figueira*, 7 Paige, 56.

¹⁰³ *Mead v. Stratton*, 20 Wkly. Dig. 44; *Bank of Montreal v. Gleason*, 14 Civ. Proc. R. (Browne) 377, 1 N. Y. Supp. 658. The remedy is against the sheriff. *Stoors v. Kelsey*, 2 Paige, 418. This applies to an action to set aside a fraudulent conveyance. *Hungerford v. Cartwright*, 13 Hun, 647; *Meyer v. Mohr*, 24 Super. Ct. (1 Rob.) 333.

¹⁰⁴ *Niver v. Crane*, 98 N. Y. 40. A judgment creditor of a foreign corporation, after execution returned unsatisfied, may sue an individual having property of the corporation in his possession, in this state, to subject such property to the payment of the judgment. *Bartlett v. Drew*, 60 Barb. 648, 658. A judgment creditor of a firm, whose execution has been returned unsatisfied, is entitled to maintain an action against a special partner to recover a sum paid to him by the firm on account of his contribution to the capital at a time when the firm was insolvent. *Baily v. Hornthal*, 154 N. Y. 648.

property fraudulently conveyed. Creditors cannot reach property which is subject to execution, except where there are fraudulent, or other, impediments in the way of the execution. The property must be something so specific that as to it, either in law or in equity, the plaintiff's judgment, or execution, or the commencement of the action, or the appointment of a receiver, will create a lien or make a title.¹⁰⁵ Moneys paid by a husband on his wife's property, in lieu of rent, without any express agreement, such as for interest, insurance, taxes, and repairs, cannot be reached where the transfer of the property from husband to wife is not fraudulent.¹⁰⁶

§ 2449. After-acquired property.

Property acquired after the commencement of the action, i. e., the service of the summons, cannot be reached. For instance, subject to the Code rule as to earnings hereafter to be noticed, an instalment of salary completely earned before the commencement of the action may be reached, though not payable until afterwards,¹⁰⁷ but salary not completely earned at such time cannot be reached.¹⁰⁸

§ 2450. Joint property.

Where the execution was issued as prescribed in section 1934 of the Code, i. e., against joint debtors with directions endorsed restricting its enforcement as against those not served with summons, and a defendant not summoned in the original action is made a defendant in a creditor's suit as authorized by the Code, personal property owned by him jointly with the defendants summoned or with any of them, may be applied to the satisfaction of the plaintiff's demand.¹⁰⁹

¹⁰⁵ Ogden v. Wood, 51 How. Pr. 375.

¹⁰⁶ Brundage v. Munger, 54 App. Div. 549, 66 N. Y. Supp. 1014.

¹⁰⁷ McCoun v. Dorsheimer, Clarke Ch. 144; Thompson v. Nixon, 3 Edw. Ch. 457.

¹⁰⁸ McCoun v. Dorsheimer, Clarke Ch. 144; Browning v. Bettis, 8 Paige, 568.

¹⁰⁹ Code Civ. Proc. § 1871.

§ 2451. Exempt property.

The Code provides that property which is expressly exempted by law from levy and sale by virtue of an execution cannot be reached.¹¹⁰

§ 2452. Earnings for personal services.

The earnings of the judgment debtor for his personal services, rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor, cannot be reached.¹¹¹ Except as stated, wages owing the judgment debtor may be reached.¹¹²

§ 2453. Interest in contract for purchase of land.

The interest of a judgment debtor in a contract for the purchase of real property by him may be reached.¹¹³

§ 2454. Trust property.

The Code provides that property held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, cannot be reached.¹¹⁴ This Code provision must be construed, however, in connection with section 78 of the Real Property Law which provides that where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of

¹¹⁰ Code Civ. Proc. § 1879. What property is exempt, see vol. 2, pp. 1415-1431.

¹¹¹ Code Civ. Proc. § 1879. This clause is identical with the Code provision relating to the exemption of earnings in supplementary proceedings which has been treated of in a preceding section (2274, subd. 3), to which reference should be made.

¹¹² *Kingman v. Frank*, 33 Hun, 471.

¹¹³ Code Civ. Proc. § 1874.

¹¹⁴ Code Civ. Proc. § 1879. If trust is created by debtor, his entire reserved fund may be reached. *Schenck v. Barnes*, 156 N. Y. 316.

such rents or profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of creditors in the same manner as other personal property, which cannot be reached by execution.¹¹⁵ It is well settled that this latter provision applies to trusts of personal, as well as of real, property.¹¹⁶

Surplus already accrued, or future surplus, or both, may be reached.¹¹⁷ A surplus may be reached, irrespective of whether the trustees are directed by the terms of the trust to apply the fund or to pay the fund over to the cestui que trust, and the power of the court to determine a reasonable allowance for the cestui que trust while the fund is in the hands of the trustees is equally operative in either case.¹¹⁸

— **What constitutes a trust created by a third person.** To be exempt as the income of a trust created by a third person, the property must be held in trust by one other than the beneficiary,¹¹⁹ and the interest of the beneficiary must be inalienable.¹²⁰ Where the design of a person creating a trust fund is that the fund shall all be paid to the beneficiary or for his benefit during his life and the beneficial interest is not in the income of the fund, and the only limitation upon the right of the beneficiary is the discretion of the trustee as to the manner of expending the funds for his benefit, such an interest is liable to be reached by creditor's bill.¹²¹ A bequest of an annuity to testator's son and the son's wife for their support and that of their family during their lives, although charged upon specific real estate devised to another son, does not create a trust, and such annuity may be reached in a creditor's suit

. ¹¹⁵ That statutes do not conflict, see *Williams v. Thorn*, 70 N. Y. 270.

¹¹⁶ *Wetmore v. Wetmore*, 149 N. Y. 520; *Hallett v. Thompson*, 5 Paige, 583; *Rider v. Mason*, 4 Sandf. Ch. 351.

¹¹⁷ *Williams v. Thorn*, 70 N. Y. 270; *Wetmore v. Wetmore*, 149 N. Y. 520; *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363.

¹¹⁸ *McEvoy v. Appleby*, 27 Hun, 44.

¹¹⁹ *Le Roy v. Rogers*, 3 Paige, 234.

¹²⁰ *Hallett v. Thompson*, 5 Paige, 583; *Degraw v. Clason*, 11 Paige, 136. Compare *Hawley v. James*, 16 Wend. 61.

¹²¹ *Havens v. Healy*, 15 Barb. 296.

by a judgment creditor of the son first named.¹²² But the income of a fund received by the judgment debtor from trustees of his wife's estate, who agreed to set apart the fund and pay him the income for five years on his withdrawing his contest of her will is the income of a trust created by a third person so as to be exempt from liability to creditors.¹²³

— **Who may reach surplus.** Only a "judgment" creditor of the beneficiary can reach the surplus.¹²⁴ This rule precludes its being reached by a trustee in bankruptcy, where the beneficiary is the bankrupt.¹²⁵ A divorced wife who has obtained a judgment for alimony is a creditor in whose favor a court of equity may direct the application of surplus income due to the husband under a trust created by the will of a third person.¹²⁶

— **Income in excess of sum necessary for support.** It is incumbent upon the plaintiff to show that there is a surplus income over what is necessary and suitable for the support and maintenance of the debtor and those dependent upon him, in view of his situation and surroundings.¹²⁷ And in determining what is a proper amount to be allowed for his expenditures, it is proper to consider the manner in which he has been brought up, the habits acquired by him and his ability to take care of his property.¹²⁸ The debtor is not bound to con-

¹²² Gifford v. Rising, 51 Hun, 1, 3 N. Y. Supp. 392.

¹²³ Everett v. Peyton, 167 N. Y. 117.

¹²⁴ Dittmar v. Gould, 60 App. Div. 94, 69 N. Y. Supp. 708.

¹²⁵ Butler v. Baudouine, 84 App. Div. 215, 82 N. Y. Supp. 773.

¹²⁶ Wetmore v. Wetmore, 149 N. Y. 520.

¹²⁷ Kilroy v. Wood, 42 Hun, 636; Williams v. Thorn, 70 N. Y. 270; Schenck v. Barnes, 156 N. Y. 316. Can reach only excess of the amount sufficient to maintain the debtor in the manner in which he has been brought up and is accustomed to. Stow v. Chapin, 21 State Rep. 38, 4 N. Y. Supp. 496.

¹²⁸ Kilroy v. Wood, 42 Hun, 636. It is proper to take into consideration that he was brought up in idle and improvident habits; and the fact that the judgment was recovered for necessities can have no weight upon the question. Sillick v. Mason, 2 Barb. Ch. 79. Due regard will be had for the station in life, social standing and accustomed manner of living of the party, both before and after the income was

tribute to such support by labor or otherwise.¹²⁹ Where the cestui que trust is a married woman, no allowance will be made for her husband, in sound health, though suitable allowance may be made for the support of children.¹³⁰ The burden of proof is on the creditor to show that there is a surplus over the amount necessary for the support of the debtor and his family.¹³¹ If there is a change of circumstances, affecting the question as to what is a reasonable allowance, the judgment may afterwards be modified.¹³²

§ 2455. Resulting trusts.

The action may be brought to establish a lien on lands paid for by the debtor but conveyed to another,¹³³ although the creditor's judgment never was a lien on the property, or, by reason of the lapse of time, has ceased to be a lien on any real property.¹³⁴

§ 2456. Contingent rights.

A mere contingent right which is but a bare possibility cannot be reached.¹³⁵ For instance, the contingent right which a person has in the estate of another, arising from the chance that he may be entitled to a share in such estate, as one of the next of kin of the owner thereof, should he outlive him, is only a bare possibility, unaccompanied by any interest during the life of such owner, and it cannot be reached by a creditors' bill.¹³⁶ So a trust created by the debtor for the benefit of his wife during her life and then for himself during life, remain-

provided. *Howard v. Leonard*, 3 App. Div. 277, 74 State Rep. 19, 38 N. Y. Supp. 363, 3 Ann. Cas. 157.

¹²⁹ *Moulton v. De Ma Carty*, 29 Super. Ct. (6 Rob.) 533.

¹³⁰ *Howard v. Leonard*, 3 App. Div. 277, 38 N. Y. Supp. 363.

¹³¹ *Bunnell v. Gardner*, 4 App. Div. 321, 38 N. Y. Supp. 569.

¹³² *Wetmore v. Wetmore*, 149 N. Y. 520.

¹³³ Section 74 of Real Property Law; *Watson v. Le Row*, 6 Barb. 481.

¹³⁴ *Scoville v. Halladay*, 16 Abb. N. C. 43; *Scoville v. Shed*, 36 Hun, 165.

¹³⁵, ¹³⁶ *Smith v. Kearney*, 2 Barb. Ch. 533.

der to his children, cannot be reached, since his wife may survive him.¹³⁷

— **Dower right.** So a wife's inchoate right of dower, before the death of her husband, cannot be reached,¹³⁸ though a right of dower of the judgment debtor, after the death of the husband but before admeasurement, may be reached.¹³⁹

§ 2457. Annuity.

An annuity given in lieu of dower may be reached.¹⁴⁰

§ 2458. Legacy.

A legacy may be reached though the income is payable to the legatee for life unless he exercises his power provided for by the will to require the payment of the principal to himself.¹⁴¹

§ 2459. Interest as next of kin.

The debtor's interest, as next of kin, in the personal estate of a decedent, may be reached, and this without making the personal representatives parties.¹⁴²

§ 2460. Rents and profits.

The rents and profits of the debtor's real property sold upon execution, for the fifteen months' possession after the sale, to which he is entitled by law, may be reached.¹⁴³

§ 2461. Excise license.

The interest of a licensee in an excise license is not property

¹³⁷ Myer v. Thomson, 35 Hun, 561.

¹³⁸ Sherman v. Hayward, 98 App. Div. 254, 90 N. Y. Supp. 481.

¹³⁹ Stewart v. McMartin, 5 Barb. 438. See, also, Payne v. Becker, 87 N. Y. 153.

¹⁴⁰ Degraw v. Clason, 11 Paige, 136. See, also, Gifford v. Rising, 51 Hun, 1, 3 N. Y. Supp. 392.

¹⁴¹ Hallett v. Thompson, 5 Paige, 583.

¹⁴² McArthur v. Hoysradt, 11 Paige, 495.

¹⁴³ Farnham v. Campbell, 10 Paige, 598.

which can be reached by a creditor's suit, it not being the subject of transfer without the consent of the excise board.¹⁴⁴

§ 2462. **Patented inventions.**

The right of a patentee of inventions may be reached by creditors and applied to the payment of his debts; and the fact that the patent was invalid for want of utility or novelty does not avail to prevent this. But it seems that unpatented inventions are not property which may be reached.¹⁴⁵

§ 2463. **Cause of action.**

The debtor's right of action for a conversion of property exempt from execution, or for a personal tort, cannot be reached; but it seems a right of action for the destruction or injury of property liable to execution may be.¹⁴⁶

§ 2464. **Right conferred by statute.**

A right secured by statute to multiply copies of a map by the use of a plat can be reached.¹⁴⁷

§ 2465. **Rights and interests in insurance policies.**

An insurance policy upon the life of a husband for the benefit of his wife, being unassignable, an assignment thereof cannot be compelled in a creditor's action against the husband and wife, nor can the avails thereof be appropriated in advance by such decree to the payment of debts, or held by a decree for the benefit of creditors until it becomes due and payable.¹⁴⁸ But where a policy has been taken out upon the life of a debtor in favor of his wife, the annual premiums upon which, paid by the debtor out of his own estate during the existence of his indebtedness, has exceeded \$500 per annum.

¹⁴⁴ Koehler v. Olsen, 68 Hun, 63, 22 N. Y. Supp. 677.

¹⁴⁵ Gillett v. Bate, 86 N. Y. 87.

¹⁴⁶ Hudson v. Plets, 11 Paige, 180.

¹⁴⁷ Barnes v. Morgan, 3 Hun, 703.

¹⁴⁸ Baron v. Brummer, 100 N. Y. 372.

a judgment creditor may maintain an action against the debtor, the company and the beneficiary under the policy to establish and declare his right to the extent of the excessive payments, although the money secured by the policy has not become due and payable.¹⁴⁹

§ 2466. Collateral security.

Security held by the debtor as surety can not be reached as against the superior equity of the creditor of his principal.¹⁵⁰

§ 2467. Property fraudulently conveyed.

Personal property, as well as real property, which has been conveyed in fraud of creditors may be reached.¹⁵¹ A creditor's bill lies to reach personal property fraudulently transferred, and when it consists of machinery, tools, etc., such new tools and machinery as may have been purchased for the purpose of supplying the waste of ordinary wear and tear may be included.¹⁵²

(D) PLEADINGS.

§ 2468. Complaint.

The contents of the complaint depends largely on the nature of the action, i. e., whether it is to reach equitable assets not subject to execution or whether it is to set aside a fraudulent conveyance. If the former, the complaint should describe, in addition to the averments as to judgment and execution, the property sought to be reached. If the action is to remove obstructions to the satisfaction of a judgment by execution, the complaint must specifically and distinctly allege there is real estate subject to the judgment, or personal property lia-

¹⁴⁹ *Stokes v. Amerman*, 121 N. Y. 337. See, also, *Tuthill v. Goss*, 69 State Rep. 454, 35 N. Y. Supp. 136; *Kittel v. Domeyer*, 175 N. Y. 205.

¹⁵⁰ *Vail v. Foster*, 4 N. Y. (4 Comst.) 312.

¹⁵¹ See ante, § 2430, subd. 2, and post, § 2492.

¹⁵² *McClosky v. Stewart*, 63 How. Pr. 137.

ble to the execution,¹⁵³ and must show that such removal will enable the judgment to attach on the property.¹⁵⁴ A former rule, now obsolete, required the complaint to state that it was not filed by collusion and that defendant has property not subject to execution to the value of one hundred dollars.¹⁵⁵

Where a statement is made at the beginning of a complaint in a creditor's suit that the plaintiffs are suing on behalf of themselves and of all other creditors, it is not necessary to add such statement to the names of the plaintiffs in the title of the complaint.¹⁵⁶ The allegation in a complaint that the action is brought on behalf of plaintiff, "and all judgment creditors who * * * shall, in due time, come in and seek relief by, and contribute to the expenses thereof," may, where no other creditors have come in, be stricken out on the plaintiff's motion.¹⁵⁷ Where one of the judgment debtors is not joined as a party because of his insolvency, such facts must fully appear in the complaint.¹⁵⁸

— **Averments as to judgment.** The recovery and docketing of a judgment should be alleged,¹⁵⁹ as should the ownership of the judgment at the time of the commencement of the action.

— **Averments as to execution.** The complaint must show the issuance of an execution to the proper county,¹⁶⁰ the deliv-

¹⁵³ *McElwain v. Willis*, 9 Wend. 548.

¹⁵⁴ *McElwain v. Willis*, 9 Wend. 548; *Spring v. Short*, 90 N. Y. 538, 545.

¹⁵⁵ *Batterson v. Ferguson*, 1 Barb. 490.

¹⁵⁶ *Cochran v. American Opera Co.*, 20 Abb. N. C. 114.

¹⁵⁷ *Green v. Griswold*, 15 Civ. Proc. R. (Browne) 220, 17 State Rep. 757, 4 N. Y. Supp. 8.

¹⁵⁸ *Van Cleef v. Sickles*, 5 Paige, 505.

¹⁵⁹ *Baggott v. Eagleson*, Hoff. Ch. 377. Demurrer does not lie to creditor's bill on ground that the bill does not show a transcript of the judgment was docketed in the county where one of defendants resides, if it does not appear on face of bill that the judgment debtor had real estate, subject to lien of the judgment, in that county. *Millard v. Shaw*, 4 How. Pr. 137.

¹⁶⁰ *Allyn v. Thurston*, 53 N. Y. 622; *Reed v. Wheaton*, 7 Paige, 663; *Smith v. Fitch*, Clarke Ch. 265. It is not sufficient to allege insolvency

ery to the sheriff before the return day,¹⁶¹ and, where a return is necessary, the return thereof unsatisfied¹⁶² before the commencement of the creditor's suit.¹⁶³ It seems, however, that the complaint need not, in terms, allege that an execution "against property" was issued, nor specifically state against whom execution was issued.¹⁶⁴

— **Averments as to insolvency.** The better practice, where the action is one to set aside a conveyance as fraudulent, is to expressly aver that the transfer left the judgment debtor insolvent;¹⁶⁵ though it has been held that a complaint alleging recovery of judgment and return of execution unsatisfied, and that after the cause of action accrued defendant transferred his property which would otherwise have been subject to the execution to his co-defendant without consideration and with intent to hinder, delay, and defraud defendant, was sufficient as against a motion to dismiss the complaint on the trial.¹⁶⁶

— **Averments as to fraud.** The complaint should expressly allege an intent to hinder, delay, and defraud creditors,¹⁶⁷ and fully and explicitly state the facts constituting the alleged fraud,¹⁶⁸ but omission to allege fraudulent intent is not

so as to show the uselessness of execution. *Adsit v. Sanford*, 23 Hun, 45.

¹⁶¹ *Conant v. Sparks*, 3 Edw. Ch. 104.

¹⁶² *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561.

¹⁶³ *Pardee v. De Cala*, 7 Paige, 132. In creditor's bill against two defendants, statement that sheriff returned that defendants had no goods, etc., is enough; it may be construed as referring to their several as well as joint property. *Conant v. Sparks*, 3 Edw. Ch. 104.

¹⁶⁴ *Citizens' Nat. Bank of Saratoga Springs v. Hodges*, 80 Hun, 471, 474, 30 N. Y. Supp. 445; *Mader's v. Whallon*, 80 Hun, 240, 29 N. Y. Supp. 993.

¹⁶⁵ *Maders v. Whallon*, 74 Hun, 372, 26 N. Y. Supp. 614; *Lewis v. Boardman*, 78 App. Div. 394, 79 N. Y. Supp. 1014.

¹⁶⁶ *Kain v. Larkin*, 141 N. Y. 144. See, also, *Hyatt v. Dusenbury*, 12 Civ. Proc. R. (Browne) 152, 5 State Rep. 846; *Citizens' Nat. Bank of Saratoga Springs v. Hodges*, 80 Hun, 471, 475, 30 N. Y. Supp. 445.

¹⁶⁷ *National State Bank of Camden v. Wheeler*, 40 App. Div. 563, 58 N. Y. Supp. 99; *Murtha v. Curley*, 90 N. Y. 372. The allegation of facts from which the conclusion of fraud may be drawn by the court is not sufficient. *Genesee River Nat. Bank v. Mead*, 18 Hun, 303.

¹⁶⁸ *Butler v. Viele*, 44 Barb. 166; *Bodine v. Edwards*, 10 Paige, 504.

fatal if there is an allegation showing that the transfer is fraudulent in law.¹⁶⁹ The complaint need not, however, set forth the evidence to show the intent to defraud.¹⁷⁰

—**Description of property.** The property sought to be reached must be specifically described.

—**Averment as to existence of surplus income.** If the action is one to reach the surplus income of a trust created by one other than the judgment debtor, the complaint must show the amount necessary for the support of the beneficiary and that there is a surplus over and above such amount.¹⁷¹

—**Prayer for relief.** The prayer for relief will depend on whether the action is brought to reach equitable assets not subject to execution or to set aside a fraudulent conveyance. If a receiver or injunction, or both, pendente lite, is desired, such relief should be prayed for.

—**Joinder of causes of action.** The complaint may seek to set aside separate conveyances to different persons at different times, without being open to the objection that it improperly joins separate causes of action.¹⁷² So a complaint does not improperly join causes of action because it is brought to reach equitable interests as well as to set aside an obstruction to the levy of execution.¹⁷³

§ 2469. Answer.

If defendant pleads want of property, he must also allege want of property at the time of the service of the summons.¹⁷⁴

But evidence of facts showing intent to defraud may be admitted though not specifically pleaded. *Maders v. Whallon*, 80 Hun, 240, 61 State Rep. 623, 29 N. Y. Supp. 993; *Citizens' Nat. Bank of Saratoga Springs v. Hodges*, 80 Hun, 471, 62 State Rep. 278, 30 N. Y. Supp. 445.

¹⁶⁹ *Stafford v. Merrill*, 62 Hun, 144, 16 N. Y. Supp. 467; *Jessup v. Hulse*, 29 Barb. 539.

¹⁷⁰ *Fuller v. Brown*, 76 Hun, 557, 559, 28 N. Y. Supp. 189; *Butler v. Viele*, 44 Barb. 166.

¹⁷¹ *Keeney v. Morse*, 71 App. Div. 104, 109, 75 N. Y. Supp. 728; *Williams v. Thorn*, 70 N. Y. 270; *McEvoy v. Appleby*, 27 Hun, 44.

¹⁷² *Dixon v. Coleman*, 28 Misc. 64, 59 N. Y. Supp. 806.

¹⁷³ *Cuyler v. Moreland*, 6 Paige, 273.

¹⁷⁴ *Trotter v. Bunce*, 1 Edw. Ch. 573. In answer to creditor's bill

If he claims that all his property is exempt, he must allege the value and amount of such property.¹⁷⁵ Defendant may impeach plaintiff's judgment on which the creditor's suit is based by showing fraud or collusion in procuring it,¹⁷⁶ or by showing a failure to acquire jurisdiction over defendants by publication of summons.¹⁷⁷

§ 2470. Variance between pleadings and proof.

An allegation that a conveyance was made with intent to hinder, delay, and defraud creditors, cannot be sustained by proof that the conveyance may be deemed in trust for the benefit of the creditor beyond the cost of his support, and as to the surplus, liable to creditors.¹⁷⁸ But where a complaint contains allegations which will authorize the court to treat the case as within the statute providing for actions not resting in fraudulent disposition of property, relief may be granted upon that theory notwithstanding allegations of fraudulent intent which the plaintiff does not succeed in establishing.¹⁷⁹

(E) PARTIES TO ACTION.

§ 2471. Plaintiff.

The action must be brought by the owner of the judgment.¹⁸⁰

alleging that, at time of rendition of judgment, defendant had not, and had not at any time since, any interest, etc., sufficiently imports that he had not at time of filing bill. *Wendell v. Shaw*, 1 Barb. 462.

¹⁷⁵ *Brown v. Morgan*, 3 Edw. Ch. 278; *Gregory v. Valentine*, 4 Edw. Ch. 282.

¹⁷⁶ *Wells v. O'Connor*, 27 Hun, 426.

¹⁷⁷ *Buswell v. Lincks*, 8 Daly, 518.

¹⁷⁸ *Third Nat. Bank of Buffalo v. Cornes*, 2 State Rep. 543.

¹⁷⁹ *Chadwick v. Burrows*, 42 Hun, 33; *Heim v. Davenport*, 45 Super. Ct. (13 J. & S.) 523.

¹⁸⁰ The successor of a removed trustee, against whom an order has been made for the restitution of moneys converted, which has become perfected by a judgment in favor of an intermediate successor, being the owner of such judgment, is in a position to maintain a creditor's suit against such removed trustee. *Stokes v. Amerman*, 121 N. Y. 337.

The person suing must be a "judgment" creditor,¹⁸¹ except, as already stated, in cases where judgment cannot be recovered.

— **Assignee.** An assignee of the judgment may sue, but, an assignee of the original cause of action on which the judgment was recovered, but not of the judgment itself, cannot sue.¹⁸²

§ 2472. Joinder of plaintiffs.

The rule that a judgment creditor may commence an action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit,¹⁸³ has not been changed by the Code.¹⁸⁴ Several judgment creditors may unite in one action to set aside a fraudulent conveyance by their debtor, provided the complaint shows a right in common to the relief demanded.¹⁸⁵ The creditor may sue alone, if he so desires,¹⁸⁶ and where he has, the court may, in its discretion, deny an application by other creditors to compel the plaintiff to bring them in as parties defendant.¹⁸⁷ But if plaintiff consents, though the summons and complaint do not show that the action is brought in behalf of all other judgment creditors than plaintiff, the court may make an order permitting such others to come in.¹⁸⁸

¹⁸¹ *Dittmar v. Gould*, 60 App. Div. 94, 69 N. Y. Supp. 708. Trustee in bankruptcy of the beneficiary cannot sue. *Butler v. Baudouine*, 84 App. Div. 215, 82 N. Y. Supp. 773.

¹⁸² *Strange v. Longley*, 3 Barb. Ch. 650.

¹⁸³ *Edmeston v. Lyde*, 1 Paige, 637; *Hendricks v. Robinson*, 2 Johns. Ch. 283.

¹⁸⁴ *Hammond v. Hudson River Iron & Mach. Co.*, 20 Barb. 378.

¹⁸⁵ *Tabor v. Bunnell*, 10 Wkly. Dig. 551. A number of judgment creditors may unite in an action to reach property transferred by the corporation judgment debtor, when insolvent, to several persons, in furtherance of a common scheme to give preference. *Wood v. Sidney Sash, Blind & Furniture Co.*, 92 Hun, 22, 72 State Rep. 830, 37 N. Y. Supp. 885.

¹⁸⁶ *Wakeman v. Grover*, 4 Paige, 23; *Hiler v. Hetterick*, 5 Daly, 33; *Claflin v. Gordon*, 39 Hun, 54.

¹⁸⁷ *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344.

¹⁸⁸ *Lallman v. Hovey*, 92 Hun, 419, 36 N. Y. Supp. 662.

To entitle creditors to come in under a decree, on a complaint in behalf of plaintiff and others similarly situated, in reference to the fund, they must be so circumstanced that they could have filed a similar complaint themselves. Thus, where plaintiff's right depended on his issuance of execution, other creditors are not entitled to come in under the decree unless they had also issued execution.¹⁸⁹ So where a judgment creditor sues in his own behalf and in behalf of all other creditors similarly situated, to set aside an assignment as fraudulent, other creditors who obtain judgments after the commencement of the action and who appear before the referee, after the interlocutory judgment setting aside the assignment, and make proof of their claims, are not entitled to share pro rata with the judgment creditor instituting the action.¹⁹⁰ Under a decree for the benefit of creditors generally, all the creditors who may wish to come in are, for every substantial purpose, considered as parties. And if the nominal plaintiff neglects to proceed, or the suit becomes abated, any such creditor may have leave to prosecute.¹⁹¹

§ 2473. Proper defendants.

In an action in the nature of a creditor's bill, plaintiff may join as defendants all persons who are fraudulent grantees or lienors, or who are united in the common design to hinder, delay, or defraud him.¹⁹² Prior to the Code, the objection to such joinder was that the bill was multifarious but now the objection is to the misjoinder of causes of action. The rule is that all the transferees of property, though the alleged fraudulent transfers were made at different times and to different persons, may be joined as defendants,¹⁹³ since in such a case there is only one cause of action.¹⁹⁴

¹⁸⁹ *Parmelee v. Egan*, 7 Paige, 610.

¹⁹⁰ *Claffin v. Gordon*, 39 Hun, 54.

¹⁹¹ *Matter of Receiver of City Bank of Buffalo*, 10 Paige, 378.

¹⁹² *Merchants' Bank of Rochester v. Thalheimer*, 23 Wkly. Dig. 116.

¹⁹³ *Reed v. Stryker*, 12 Abb. Pr. 47, 4 Abb. Dec. 26; followed *Newbould v. Warrin*, 14 Abb. Pr. 89; to the same effect, *Morton v. Weil*, 33 Barb. 30, 11 Abb. Pr. 421; *Skinner v. Stuart*, 13 Abb. Pr. 442; *Dixon*

A joint debtor not served with summons in the action in which the judgment was recovered, on which the creditor's action is based, may be joined as a defendant.¹⁹⁵ So where an assignee of a judgment debtor who has recovered judgment on some of the notes assigned to him, has reassigned the notes, he is a proper party to a creditor's bill, in order that his interest in the judgments may be determined.¹⁹⁶

§ 2474. Necessary defendants.

All the judgment debtors are necessary parties,¹⁹⁷ unless it can be shown that the one omitted is insolvent and wholly destitute of property,¹⁹⁸ or that he is a mere surety for the other defendants and the fraudulent transfer was made by other debtors.¹⁹⁹ The rule has been stated more broadly as follows: "Where there are several judgment debtors, all of them are necessary defendants, unless the complaint shows that those not joined as parties are mere sureties, or are not

v. Coleman, 28 Misc. 64, 59 N. Y. Supp. 806. Judgment creditors may bring one action to set aside several transfers made by the corporation, judgment debtor, of different lots of property, to different transferees, and to recover property taken under judgments collusively obtained, all the acts being in pursuance of a scheme to give an unlawful preference. *Wood v. Sidney Sash, Blind & Furniture Co.*, 92 Hun, 22, 72 State Rep. 830, 37 N. Y. Supp. 885.

¹⁹⁴ See vol. 1, pp. 59, 60.

¹⁹⁵ See Code Civ. Proc. § 1871. May be joined to enable the others to claim contribution. *Van Cleef v. Sickles*, 5 Paige, 505; *Austin v. Figueira*, 7 Paige, 56.

¹⁹⁶ *Wetmore v. Candee*, 49 N. Y. 667.

¹⁹⁷ *Ferguson v. Ann Arbor R. Co.*, 17 App. Div. 336, 45 N. Y. Supp. 172; *Miller v. Hall*, 70 N. Y. 250. But where the judgment debtors were not joined as defendants, but it appeared, in the proceedings in the case that they had by stipulation consented to be bound by the judgment, and relinquished all title and claim in the subject-matter of the action, the court was at liberty to go on without their presence to final judgment, as against the defendants named in the pleadings. *Cowing v. Greene*, 45 Barb. 585.

¹⁹⁸ Such fact must be distinctly averred in the complaint. *Van Cleef v. Sickles*, 5 Paige, 505.

¹⁹⁹ *Fox v. Moyer*, 54 N. Y. 125.

legally or morally liable to contribute toward the satisfaction of the debt, or are insolvent, or are out of the jurisdiction of the court.²⁰⁰

In an action to set aside the transfer of a seat in a stock exchange as fraudulent, the stock exchange is not a necessary party, but where the seat was assigned to an agent to pay up dues and to pay a certain debt, such creditor is a necessary defendant.²⁰¹

—**Assignor.** If plaintiff is an assignee of part of the judgment only, or only of the obligations which the judgment secured, the original judgment creditor, or other owner of the residue, must be made a party.²⁰² So in an action by a receiver appointed in supplementary proceedings to have set aside an assignment made by the judgment debtor, the latter is a necessary party.²⁰³

—**Assignee.** If the suit is to reach property fraudulently assigned, the assignee is a necessary party.²⁰⁴

—**Remote grantees.** Where the only relief demanded in a creditor's suit is that the grantees of the judgment debtor account for the proceeds of property conveyed by them, and that the conveyances to them be declared void as to creditors, their grantees are not necessary parties.²⁰⁵ And, in an action by stockholders to set aside a deed and subsequent convey-

²⁰⁰ Where the action is based on a joint judgment against several defendants, not sureties, some not having been served with process, all must be made defendants in a creditor's bill. But where the court had stayed all proceedings on the judgment, as against one defendant, to let in a defense upon his part, but without prejudice to the judgment as against the others, a creditor's bill against such others alone was sustainable. *Commercial Bank of Lake Erie v. Meach*, 7 Paige, 448.

²⁰¹ *Sprogg v. Dichman*, 28 Misc. 409, 59 N. Y. Supp. 966.

²⁰² *Strange v. Longley*, 3 Barb. Ch. 650.

²⁰³ *Miller v. Hall*, 70 N. Y. 250.

²⁰⁴ *Edmeston v. Lyde*, 1 Paige, 637; *Sage v. Mosher*, 28 Barb. 287. But in an action by a creditor to avoid a conveyance, one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee, and who has conveyed in accordance with the trust, is not a proper party. *Spicer v. Hunter*, 14 Abb. Pr. 4.

²⁰⁵ *Arnot v. Birch*, 29 App. Div. 356, 51 N. Y. Supp. 491.

ances and liens, though the subsequent grantees and holders of the liens are necessary parties, yet without such parties, an action may be maintained to compel the parties to the fraud, and those who subsequently aided in its consummation, to account as trustees ex maleficio for whatever they have received through the wrongs committed.²⁰⁶

— **Other creditors of judgment debtor.** In an action to set aside transfers as fraudulent as to creditors, it is not necessary, ordinarily, to make other creditors of the judgment debtor parties.²⁰⁷ But in a creditor's action to set aside as fraudulent certain transfers of the debtor's property made in pursuance of an agreement between the debtor, certain of his creditors, and third parties, where the complaint alleged that the agreement and transfers were made to hinder, delay, and defraud creditors, and asked that the agreement and transfers be declared null and void, the creditors and others who were parties to the agreement were necessary parties.²⁰⁸

— **Beneficiary under assignment.** In a creditor's suit seeking to set aside a transfer of property by the debtor to a third person for the benefit of still another third person, the latter is a necessary party.²⁰⁹ So a third person beneficially provided for in the transfer of property to a married woman as her separate estate is a necessary party to an action to set it aside as in fraud of creditors.²¹⁰

— **Stockholders of assignee.** Where a judgment creditor of a firm sued to set aside a transfer of its assets to a corporation, and alleged that part of the stock in such corporation

²⁰⁶ *Pondir v. New York, L. E. & W. R. Co.*, 31 Abb. N. C. 29, 72 Hun, 384, 55 State Rep. 63, 25 N. Y. Supp. 560. To such an action, corporations (being subsequent grantees), whose stock is entirely held by the defendant corporation which received the property, are not on any ground necessary parties. *Id.*

²⁰⁷ *Stiefel v. Berlin*, 28 App. Div. 103, 51 N. Y. Supp. 147.

²⁰⁸ *National Broadway Bank v. Yuengling*, 58 Hun, 474, 36 State Rep. 199, 12 N. Y. Supp. 762. It seems that if plaintiff had made no reference to the agreement, but had attacked only the subsequent transfers, the rule would be different. *Id.*

²⁰⁹ *Hamilton Nat. Bank v. Halsted*, 56 Hun, 530, 9 N. Y. Supp. 852.

²¹⁰ *Lore v. Dierkes*, 51 Super. Ct. (19 J. & S.) 144, 16 Abb. N. C. 47.

was fraudulently issued to persons not bona fide creditors of the firm, and whose claims were less than the amount of stock, such stockholders were not necessary parties to the action.²¹¹

—**Representatives of judgment debtor.** Where the judgment debtor dies after a fraudulent conveyance by him, his devisees need not be made parties to an action to set aside such conveyance.²¹² Although the heirs of the grantor, after his death, may be brought in as parties to an action by a judgment creditor to set aside a deed as fraudulent, for the purpose of determining whether a legal estate vested in the grantee as against them, yet, if not brought in, a judgment may be rendered declaring the deed void as to plaintiff, and his judgment a lien on the lands.²¹³

(F) LIEN.

§ 2475. When created.

A judgment is a lien on real estate from the time it is docketed, and the lien extends to property fraudulently conveyed by the judgment debtor.²¹⁴ It follows that the priority of judgment creditors is not affected by actions brought to set aside a fraudulent conveyance of such real property.²¹⁵ If judgment has been docketed more than four months before the institution of bankruptcy proceedings, a lien is created not only as to real property actually held by the judgment debtor but also as to any previously transferred by him in fraud of creditors, so that the judgment creditor may sue to set aside such conveyance.²¹⁶ If the action is to remove an

²¹¹ *Gardner v. C. B. Keogh Mfg. Co.*, 63 Hun, 519, 18 N. Y. Supp. 391.

²¹² *Royer Wheel Co. v. Fielding*, 31 Hun, 274, 279.

²¹³ *Young v. Heermans*, 66 N. Y. 374.

²¹⁴ See ante, § 2467. But see *Matter of David*, 44 Misc. 516, 90 N. Y. Supp. 85, which holds that the commencement of a creditor's suit is necessary to create a lien.

²¹⁵ *Wilkinson v. Paddock*, 57 Hun, 191, 197, 11 N. Y. Supp. 442; *Scouton v. Bender*, 3 How. Pr. 185. Compare *Warden v. Browning*, 12 Hun, 497.

²¹⁶ *Hillyer v. Le Roy*, 179 N. Y. 369. See, also, *Ninth Nat. Bank v. Moses*, 39 Misc. 664, 80 N. Y. Supp. 617.

obstruction to the enforcement of a judgment against real estate, a *lis pendens* should be filed together with the complaint, at the commencement of the action.²¹⁷ But if a person knows, or is chargeable with notice, of the pendency of the action, when he purchases, and thereafter makes improvements, he cannot be compensated therefor.²¹⁸ An equitable lien on the "rents and profits" of real estate fraudulently conveyed is not obtained until the commencement of the creditor's suit.²¹⁹

If the action is to remove an obstruction to the enforcement of the judgment against "personal" property subject to levy, the mere commencement of the action creates no lien as against other creditors in respect of such personal property, or, if any lien exists, it is merely inchoate, and subject to be overreached by a subsequent levy in favor of other creditors made before the appointment of a receiver.²²⁰ An effectual lien, in such a case, is not created until the appointment of a receiver in the creditor's suit. The priority obtained by the appointment of a receiver in a creditor's suit is not affected by a subsequent appointment of the same person as receiver, in supplementary proceedings by junior creditors.²²¹

If the action is brought to enforce the judgment against equitable assets, not subject to execution, the plaintiff acquires an equitable lien on such assets by the commencement of the suit,²²² which lien cannot be defeated by the debtor's act.²²³

²¹⁷ *Edmonston v. McLoud*, 16 N. Y. 543; *Mandeville v. Campbell*, 45 App. Div. 512, 61 N. Y. Supp. 443. Doctrine of *lis pendens* is not applicable to corporate stock. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

²¹⁸ *Patterson v. Brown*, 32 N. Y. 81, 95.

²¹⁹ *Hillyer v. Le Roy*, 179 N. Y. 369.

²²⁰ *First Nat. Bank of Amsterdam v. Shuler*, 153 N. Y. 163; *Davenport v. Kelly*, 42 N. Y. 193; *Kitchen v. Lowery*, 127 N. Y. 53; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Claffin v. Gordon*, 39 Hun, 54, 58.

²²¹ *Field v. Sands*, 21 Super. Ct. (8 Bosw.) 685.

²²² *First Nat. Bank of Amsterdam v. Shuler*, 153 N. Y. 163; *Jeffres v. Cochrane*, 47 Barb. 557; *Kennedy v. McGuire*, 15 Hun, 70.

²²³ *Swart v. Oakley*, 22 Abb. N. C. 125, 6 N. Y. Supp. 710; *Metcalf v. Del Valle*, 64 Hun, 245, 19 N. Y. Supp. 16; *Utica Ins. Co. v. Power*, 3 Paige, 365; *Clark v. Brockway*, 1 Abb. Dec. 351, 3 Keyes, 13; *Storm v. Waddell*, 2 Sandf. Ch. 494. Where debtor becomes a bankrupt after

It is not the return of the execution, but the service of summons in the creditor's suit, which creates a lien on the debtor's equitable estate.²²⁴ If the action is to reach the surplus income of a trust, the creditor, by the commencement of the action, acquires a lien on the accrued and unexpended surplus of income then in the hands of the trustees; and this lien is superior to the claim of the general creditors or assignee of the beneficiary.²²⁵

§ 2476. Extent.

The lien does not extend to subsequently acquired property, except in so far as future surplus income of a trust may be so considered. The lien created by the commencement of the action embraces the rents and profits of the land fraudulently conveyed.²²⁶ But the commencement of an action to set aside an alleged fraudulent conveyance of premises which had been previously mortgaged does not create a lien on surplus moneys derived from a sale under foreclosure of the mortgage as against a depositary, and deposited under an order of court.²²⁷

§ 2477. Relation back.

The lien created by the commencement of an action in the nature of a creditor's bill does not relate back to proceedings supplementary to execution on the same judgment, which did not proceed to the appointment of a receiver.²²⁸

§ 2478. Duration.

The lien is not lost by the death of the debtor, pending the appointment of receiver, the receiver's rights are superior to those of the assignee in bankruptcy. *Roberts v. Albany & W. S. R. Co.*, 25 Barb. 662.

²²⁴ *Edmeston v. Lyde*, 1 Paige, 637; *Beck v. Burdett*, 1 Paige, 305.

²²⁵ *Tolles v. Wood*, 99 N. Y. 616.

²²⁶ *National Union Bank v. Riger*, 38 App. Div. 123, 56 N. Y. Supp. 545.

²²⁷ *Swart v. Oakley*, 22 Abb. N. C. 125, 6 N. Y. Supp. 710.

²²⁸ *Edmonston v. McLoud*, 16 N. Y. 543. To same effect, *Ballou v. Boland*, 14 Hun, 355.

suit, and before a receiver has been appointed, but continues against his personal representative.²²⁹ The lien acquired by the commencement of the action is defeasible only by a discharge of the debt or a successful defense of the suit. A discharge of the debtor, in bankruptcy, pending the suit, does not discharge or impair the lien.²³⁰

§ 2479. Waiver of lien of judgment.

An action in aid of an execution, merely to remove a fraudulent conveyance which is an obstruction in the way of collecting the original judgment, is not a waiver or abandonment of the benefit of plaintiff's original judgment, i. e., the right to have his claim paid from the proceeds of the real estate fraudulently conveyed.²³¹ But if the complaint seeks not only to set aside the fraudulent conveyance but also to have a receiver appointed and a sale ordered, the original lien is lost by the appointment of the receiver.²³²

§ 2480. Priority between creditors bringing separate actions.

Priority between different creditors who have brought separate creditor's suits to reach equitable assets depends on the priority in service of summons.²³³ It would seem that where the summons in two actions are served the same day, the one in which summons is first served takes priority, and the fact that the mistake of an officer caused the delay of the service

²²⁹ *Brown v. Nichols*, 42 N. Y. 26; *Storm v. Waddell*, 2 Sandf. Ch. 494; *First Nat. Bank of Amsterdam v. Shuler*, 153 N. Y. 163.

²³⁰ *Storm v. Waddell*, 2 Sandf. Ch. 494.

²³¹ *Hillyer v. Le Roy*, 179 N. Y. 369, 377. The lien is not waived for equitable one created by the notice of pendency of action. *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166.

²³² Where the judgment creditor has asked to have a receivership extended to his action, he cannot then claim that the receiver is subject to his lien by judgment, and sell the real estate under execution, and deprive the purchaser at the receiver's sale of a good title, but he is entitled to be paid from the surplus moneys in the receiver's hands, where they are to stand as real estate. *MacDonald v. MacDonald*, 42 State Rep. 480, 17 N. Y. Supp. 230.

²³³ *Boynton v. Rawson*, Clarke Ch. 584; *Fitch v. Smith*, 10 Paige, 9.

of the later summons is no reason for depriving the other of his priority.²³⁴

(G) INJUNCTION.

§ 2481. Code provision.

In a creditor's suit to reach equitable assets, the Code provides for the issuance of a "temporary injunction, restraining the transfer to any person, or the payment or delivery to the judgment debtor, of any money, thing in action, or other property or interest, which may * * * be applied to the satisfaction of the sum due to the plaintiff."²³⁵

§ 2482. Exhaustion of remedy at law.

An injunction will not be granted unless the creditor has exhausted his remedy at law.²³⁶

§ 2483. Procedure.

The injunction, and the proceedings before and after it is granted, are governed by the Code chapter on temporary injunctions, for which purpose the injunction is deemed to be one granted under section 603 of the Code, i. e., where the right to the injunction appears from the complaint and not from extrinsic facts.²³⁷ The facts to be shown to warrant an injunction will not, therefore, be stated but reference should be made to a preceding volume.²³⁸

§ 2484. Violation of injunction.

General rules as to what constitutes a violation of an injunc-

²³⁴ Safford v. Douglas, 4 Edw. Ch. 537.

²³⁵ Code Civ. Proc. § 1786; Bank of Montreal v. Gleason, 14 Civ. Proc. R. (Browne) 377, 16 State Rep. 768, 1 N. Y. Supp. 658.

²³⁶ Brooks v. Stone, 11 Abb. Pr. 220, 19 How. Pr. 395.

²³⁷ Code Civ. Proc. § 1876. Moving papers must be the same as where injunction is sought in any action under section 603 of the Code. See Clark v. King & Bro. Pub. Co., 40 App. Div. 405, 57 N. Y. Supp. 975.

²³⁸ Volume 2, pp. 1574, 1575.

tion order have been set forth in a preceding volume.²³⁹ Any active interference with the property, for the purpose of transferring title to another, is a violation of the injunction.²⁴⁰ For instance, the procuring an execution to be issued in behalf of another creditor, and taking his property to the sheriff, is a violation.²⁴¹ But the act of the debtor in suing for a trespass to property exempt from execution is not in itself a breach of the injunction,²⁴² nor is the merely carrying into effect, by procuring novation, a previous assignment of a right of action.²⁴³ And a confession of judgment in favor of another bona fide creditor ordinarily is not a violation,²⁴⁴ unless done with a view to defeat the remedy of plaintiff by interposing delays so as to secure the prior appointment of a receiver in a proceeding upon the confessed judgment.²⁴⁵

§ 2485. Vacation.

The rules as to the vacation of injunction orders in general are set forth in a preceding volume.²⁴⁶ The injunction will not be dissolved merely because the debtor denies that he has any property.²⁴⁷

(H) RECEIVER.

§ 2486. Code provision.

The Code provides as follows: "The court may, by an order, or by the interlocutory or final judgment in the action, appoint a receiver of any or all of the property of the judgment debtor, and may direct the judgment debtor, or any other defendant in the action, to convey or deliver to the receiver, as justice requires, any property, real or personal, book,

²³⁹ Volume 2, p. 1587.

²⁴⁰, ²⁴¹ *Lansing v. Easton*, 7 Paige, 364.

²⁴² *Hudson v. Plets*, 11 Paige, 180.

²⁴³ *Richardson v. Rust*, 9 Paige, 243; *Ireland v. Smith*, 3 How. Pr. 244, 1 Barb. 419.

²⁴⁴ *Lansing v. Easton*, 7 Paige, 364.

²⁴⁵ *Ross v. Clussman*, 5 Super. Ct. (3 Sandf.) 676.

²⁴⁶ Volume 2, pp. 1593-1604.

²⁴⁷ *New v. Bame*, 10 Paige, 502.

voucher, or other paper, or to execute any instrument, which it deems necessary, for perfecting or assuring the receiver's title or possession."²⁴⁸ This refers to the property which the plaintiff, in his complaint, seeks to reach, or as to which a discovery is sought. It may be all the property of the judgment debtor or it may be some specific piece of property.²⁴⁹

The practice is regulated by that pertaining to the appointment of receivers in general.²⁵⁰

§ 2487. Necessity.

To create a lien where it is sought to remove an obstruction to the enforcement of a judgment against personal property subject to execution, it is necessary to appoint a receiver.²⁵¹ And it is generally advisable to obtain the appointment of a receiver where one seeks to reach equitable assets not subject to execution.

§ 2488. Propriety of appointing a receiver.

The grounds for the appointment of a receiver in a creditor's suit do not differ from those laid down by the Code as applicable to actions generally, where no special provision is otherwise made by statute.²⁵² Anticipated removal, destruction, loss, or injury to, the property, *pendente lite*, is the usual ground.²⁵³ Where a creditor has obtained an injunction, it is his duty to apply for a receiver to protect his property and effectuate his lien.²⁵⁴ This rule applies as well where the debtor's assignee is a party and has been enjoined, as where the debtor is the sole defendant, and even where defendants have

²⁴⁸ Code Civ. Proc. § 1877.

²⁴⁹ *National Union Bank v. Riger*, 38 App. Div. 123, 56 N. Y. Supp. 545.

²⁵⁰ Volume 2, pp. 1617-1658.

²⁵¹ See ante, § 2487.

²⁵² See vol. 2, pp. 1622-1627.

²⁵³ See *National Union Bank v. Riger*, 38 App. Div. 123, 56 N. Y. Supp. 545.

²⁵⁴ *Lent v. McQueen*, 15 How. Pr. 313; *Webb v. Overmann*, 6 Abb. Pr. 92.

not answered.²⁵⁵ If real property is discovered, and its application becomes necessary to satisfy the debt, a receiver of the rents may be appointed, unless the complainant knew of the title, and might have had it sold under the execution.²⁵⁶ If it appear from the complaint that plaintiff's remedy at law has not been exhausted, a receiver should not be appointed.²⁵⁷ So the fact that the execution on which the action is founded was issued to the wrong county is a valid objection to the appointment of a receiver.²⁵⁸ But defendant's offer to turn out to the sheriff sufficient property to satisfy the execution is no reason for not appointing a receiver, as defendant has his remedy against the sheriff if he makes a false return.²⁵⁹ The granting of the application is usually a matter of course,²⁶⁰ and the court cannot go behind the judgment and execution.²⁶¹ Where a judgment creditor has issued execution, which cannot be levied by reason of transfers, mortgages and a general assignment, he may, before the return of the execution, sue to set the assignment, etc., aside as fraudulent, but the action being in his own behalf alone, he is not entitled to the appointment of a receiver, but only to a levy under the execution upon the property upon which his lien attaches unobstructed by the assignment and transfers.²⁶²

The appointment of a receiver in supplementary proceedings is no bar to the appointment of another receiver in the creditor's suit.²⁶³ Ordinarily, however, in such a case, the receivership will be extended.

²⁵⁵ *Bank of Monroe v. Schermerhorn*, Clarke Ch. 214.

²⁵⁶ *Congden v. Lee*, 3 Edw. Ch. 304.

²⁵⁷ *Starr v. Rathbone*, 1 Barb. 70. The same rule applies where it appears by defendant's positive affidavit. *Wright v. Strong*, 3 How. Pr. 112.

²⁵⁸ *Strange v. Longley*, 3 Barb. Ch. 650.

²⁵⁹ *Balde v. Smith*, 5 Ch. Sent. No. 2, 11.

²⁶⁰ *Lent v. McQueen*, 15 How. Pr. 313; *Bloodgood v. Clark*, 4 Paige, 575.

²⁶¹ *Lent v. McQueen*, 15 How. Pr. 313.

²⁶² *Home Bank v. J. B. Brewster & Co.*, 15 App. Div. 338, 44 N. Y. Supp. 54.

²⁶³ See ante, § 2357.

§ 2489. **New receiver.**

Where, in a creditor's suit, a receiver of the debtor's property is appointed, to whom the debtor assigns his property, and thereafter the receiver dies, the property vests in the court, and although the debtor afterwards dies, it may appoint a new receiver to carry the suit to completion, without notice of the proceedings therefor to the defendants therein.²⁶⁴

(I) JUDGMENT.

§ 2490. **In Code actions.**

The final judgment in an action brought pursuant to the Code provisions must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action, whether the same might or might not have been originally taken, by virtue of an execution.²⁶⁵ A receiver may be appointed and defendant directed to transfer certain property to the receiver to be sold by the latter and the proceeds applied to the payment of plaintiff's claim.²⁶⁶

§ 2491. **In actions to reach surplus income.**

If the action is to reach the surplus income of a trust, the judgment should, it seems, fix the sum necessary for support, and direct the payment over of the surplus as represented by accrued income, and, if that is insufficient, direct the retention of the surplus of future instalments of income.²⁶⁷

²⁶⁴ *Nicoll v. Boyd*, 90 N. Y. 516.

²⁶⁵ Code Civ. Proc. § 1873. In an action by a judgment creditor to have his judgment declared a lien on the proceeds of an equitable interest in lands, wherein the widow and heirs of the equitable owner, and the former holder of the legal title and holder of the proceeds of the sale, are parties, and where it does not appear that there are other claims on the proceeds, the judgment may establish a lien on the lands or proceeds and determine the ultimate rights of the parties. *Bowery Nat. Bank v. Duncan*, 12 Hun, 405.

²⁶⁶ *McArthur v. Hoysradt*, 11 Paige, 495.

²⁶⁷ *Williams v. Thorn*, 70 N. Y. 270, 278; *Wetmore v. Wetmore*, 149 N. Y. 520.

§ 2492. In actions to remove an obstruction.

The ordinary judgment, in an action to set aside a fraudulent incumbrance or conveyance, where there is only one plaintiff, is to merely set aside the conveyance or incumbrance as to plaintiff²⁶⁸ and direct a sale on the execution as if such conveyance or incumbrance had never existed.²⁶⁹ The rights of a judgment creditor not made a party cannot be prejudiced by the judgment.²⁷⁰ In an action in aid of an execution, to set aside a fraudulent conveyance, where an execution has been issued but not returned, the judgment cannot adjudge the conveyances fraudulent and set them aside as to other persons than the plaintiff nor as to any property on which plaintiff's executions were not liens.²⁷¹ So, in such an action, a receiver cannot be appointed.²⁷² In such a case, the proper judgment is to set aside the conveyance, so far as it obstructs the plaintiff's judgment, and permit him to pursue his remedy on his judgment in the usual way.²⁷³ The judgment may, however, if the action is brought in behalf of plaintiff and all other judgment creditors, direct an assignment by the debtor to a receiver and then a sale by the latter for the purpose of satisfying the debt.²⁷⁴ A judgment which directs a sale by a referee, as in foreclosure cases, without appointing a receiver, or directing a conveyance to him, is irregular, and should be set aside, with permission to apply again at special term for a

²⁶⁸ Should not be set aside as between the parties nor as to other creditors. *Lees v. Hayden*, 78 Hun, 370, 29 N. Y. Supp. 179. If the relief of plaintiff only is sought, and it does not appear that there are other creditors, the judgment should not direct a surplus to be brought into court, but only vacate the conveyance as against plaintiff's judgment, and direct a sale; or, appoint a receiver, and direct a sale by him. *Kennedy v. Barandon*, 67 Barb. 209, 4 Hun, 642.

²⁶⁹ *Young v. Heermans*, 66 N. Y. 374.

²⁷⁰ *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344, 348.

²⁷¹, ²⁷² *Home Bank v. J. B. Brewster & Co.*, 15 App. Div. 338, 342, 44 N. Y. Supp. 54.

²⁷³ *Bryer v. Foerster*, 14 App. Div. 315, 43 N. Y. Supp. 801; *Harris v. Osnowitz*, 35 App. Div. 594, 55 N. Y. Supp. 172.

²⁷⁴ *Chautauque County Bank v. Risley*, 19 N. Y. 369, 373; *Shand v. Hanley*, 71 N. Y. 319.

proper judgment.²⁷⁵ If the judgment merely sets aside the fraudulent conveyance, without appointing a receiver, the land will remain charged with the liens of the several judgments in the order of their docketing, and the proceedings to enforce them will be regulated by the statute. If it goes further and appoints a receiver and directs a conveyance to him, a purchaser under the receiver's sale will take title as of the time of the debtor's conveyance to the receiver, subject, however, to judgments in favor of other creditors.²⁷⁶ The title of a purchaser at such receiver's sale, though not good against valid liens existing prior to the filing of the complaint, is good as to the holder of a lien or a claimant of other interest in the property who is made a defendant and whose lien or claim is adversely disposed of by the judgment.²⁷⁷

If the sale, alleged to be fraudulent, was in good faith, so far as the grantee is concerned, and for an adequate price, the title of the grantee cannot be attacked.²⁷⁸ If the price was inadequate but the grantee acted in good faith, the judgment should not set aside the conveyance but should allow it to stand as security for the sum paid.²⁷⁹ If, however, the grantee has participated in the fraud, the judgment should not protect him for any sum paid or liability assumed by him.²⁸⁰ So where the grantee participates in the fraudulent intent of the grantor, the transfer cannot be given effect even so far as to make it security for the actual indebtedness proved.²⁸¹ And where a person receives a fraudulent conveyance of mortgaged lands, and he knowingly participates in the fraud, and thereafter the conveyance is set aside as fraudulent, he cannot, as against a creditor of the mortgagor, be subrogated, by a suit in equity, to the rights of the mortgagee merely because he has paid the mortgage.²⁸² The fraudulent grantee may, in ad-

²⁷⁵ *Union Nat. Bank v. Warner*, 12 Hun, 306.

²⁷⁶ *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344.

²⁷⁷ *Shand v. Hanley*, 71 N. Y. 319, 324.

²⁷⁸ *Dorr v. Beck*, 76 Hun, 540, 28 N. Y. Supp. 206.

²⁷⁹ *Boyd v. Dunlap*, 1 Johns. Ch. 478.

²⁸⁰ *Davis v. Leopold*, 87 N. Y. 620. See comment on this case in 134 N. Y. 525.

²⁸¹ *Woods v. Van Brunt*, 6 App. Div. 220, 39 N. Y. Supp. 896.

²⁸² *Weiser v. Kling*, 38 App. Div. 266, 57 N. Y. Supp. 48.

dition, be compelled to account for the rents and profits of the real estate, accruing from the time he took possession up to the time of judgment.²⁸³ But rents received prior to the commencement of the suit cannot be recovered nor can rents received thereafter where the necessary expenses of taking care of the property are in excess thereof.²⁸⁴ The judgment may allow the fraudulent grantee, where he is made to account for the rents and profits of the property fraudulently conveyed, sums paid by him for taxes, for necessary repairs, and as interest on valid liens on the property, and commissions of a necessary agent, but not sums paid for insurance premiums which have benefited no one.²⁸⁵ If the personal property transferred was previously pledged in good faith to secure a valid debt, to a stranger, and the fraudulent transferee pays the loan for which the property was pledged, he cannot be held for the entire amount received on the sale of the property, but merely for the amount in excess of the amount of the loan.²⁸⁶ However, in such a case, if the transferee sold the property for less than its value, the judgment should be for the value less the amount paid to satisfy the loan.²⁸⁷ A fraudulent transferee will not be allowed for expenses, incurred in preparing the property for market, in excess of the value of the property at the time he received the property.²⁸⁸

If the fraudulent grantee has transferred the property to a bona fide purchaser for value, the only judgment which can be rendered is to compel the fraudulent grantee to account for the proceeds of the sale.²⁸⁹ Equity will apply property

²⁸³ *Loos v. Wilkinson*, 110 N. Y. 195, 214.

²⁸⁴ *Collumb v. Read*, 24 N. Y. 505, 514.

²⁸⁵ *Loos v. Wilkinson*, 113 N. Y. 485.

^{286, 287} *Hamilton Nat. Bank v. Halsted*, 134 N. Y. 520.

²⁸⁸ *Saugerties Bank v. Mack*, 35 App. Div. 398, 54 N. Y. Supp. 950. In this case, the court says: "But where parties become fraudulently possessed of property for which they are called upon to account, the court will not be astute in aiding them to make the damages for which they are to respond as slight as possible."

²⁸⁹ *Skillin v. Maibrunn*, 75 App. Div. 588, 78 N. Y. Supp. 436, which held that such relief was equitable in its nature and that the plaintiff should not be remitted to an action at law.

received in exchange for it in satisfaction of the creditors' claims.²⁹⁰

The court, on finding that two or more of the transfers attacked by judgment creditors are fraudulent, is not bound, as a matter of law, to set aside only such of them as will enable the plaintiffs to satisfy their claims and to leave the others, equally tainted with the fraud, undisturbed.²⁹¹

—**Money judgment.** In a suit to set aside a fraudulent conveyance, a pecuniary judgment may be rendered for instalments, under an agreement, as to which instalments, coming due after the commencement of the suit, a judgment has not been recovered.²⁹²

—**Interlocutory judgment.** Where the action is brought by one creditor for the benefit of all, or where several creditors join in the action, an interlocutory judgment may be entered appointing a receiver and directing a conveyance to him.²⁹³ The creditors who will be allowed to come in are only those who stand in the same position as plaintiff in so far as the exhaustion of the remedy at law is concerned.²⁹⁴ A referee is usually appointed to hear the claims of such creditors. Claims by creditors who have ratified the fraudulent transfer cannot be allowed nor can claims founded on indebtedness that arose after the fraudulent transfer.²⁹⁵ Where a creditor's action is brought by a plaintiff in his own behalf, and in behalf of such others as may come in before the final decree, and contribute to expenses: and, after the usual notice for that purpose, other creditors appear before the referee, on the accounting, and prove their debts, and except to the referee's report, such other creditors, whether deemed actual parties or not,

²⁹⁰ *Carver v. Barker*, 73 Hun, 416, 26 N. Y. Supp. 919.

²⁹¹ The court is not bound to consider the question as to how far the effect of the judgment shall be limited by the amount of the plaintiffs' claims, but has the power to set them all aside. *Metcalf v. Moses*, 161 N. Y. 587, 596.

²⁹² *Carpenter v. Osborn*, 102 N. Y. 552, 562.

²⁹³ See *Kaupe v. Bridge*, 25 Super. Ct. (2 Rob.) 459.

²⁹⁴ *Clafin v. Gordon*, 39 Hun, 54.

²⁹⁵ *Lore v. Dierkes*, 51 Super. Ct. (19 J. & S.) 144.

without an order of court declaring them such, are entitled to notice of an application for judgment on the referee's report.²⁹⁶ A provision in the judgment that any judgment creditor of the defendant may come in and have the benefit of the decree upon notice of the application should require such notice to be given to defendant's, as well as plaintiff's, attorney.²⁹⁷

§ 2493. Time of rendition.

Judgment need not be rendered within sixty days from the time of the issuance of the execution.²⁹⁸

§ 2494. Reaching interest in land contract.

The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of the interest, if any, of the judgment debtor, in a contract for the purchase of real property by him, either by selling the interest, or by transferring it to the judgment creditor, in such a manner and upon such terms as the court deems most conducive to the interests of the parties. Where the person, bound to perform the contract to the judgment debtor, is a defendant in the action, the final judgment may direct a specific performance of the contract to the judgment creditor, or, where the interest in the contract is directed to be sold, to the purchaser.²⁹⁹ The value of the interest of the judgment debtor holding the contract must be ascertained, under the direction of the court, and so much thereof as is necessary must be applied to the payment of the sum due to the plaintiff, and the residue, if any, to the benefit of the judgment debtor.³⁰⁰

²⁹⁶ Anon., 18 Abb. Pr. 87.

²⁹⁷ *Roe v. Hume*, 72 Hun, 1, 25 N. Y. Supp. 576. .

²⁹⁸ *Home Bank v. J. B. Brewster & Co.*, 15 App. Div. 338, 44 N. Y. Supp. 54; followed in *Schwartzschild & Sulzberger Co. v. Mathews*, 39 App. Div. 477, 57 N. Y. Supp. 338.

²⁹⁹ Code Civ. Proc. § 1874.

³⁰⁰ Code Civ. Proc. § 1875.

§ 2495. **Conformity to relief prayed for.**

Relief other than that prayed for may be granted,³⁰¹ provided such relief is consistent with the theory of the complaint.³⁰² But judgment creditors, suing for equitable relief, cannot have, in addition to a decree that the sheriff pay their claim out of funds in his hands, a personal judgment against the debtor, enforceable by execution against him, beyond the costs of the action, since they have a judgment for that already.³⁰³

§ 2496. **Construction.**

A general direction for an accounting, contained in a judgment in a creditor's suit, is to be construed by the situation in which it was made; and if the suit be by specified creditors, for their own benefit only, and not on behalf of others also, the accounting should proceed no further than to ascertain and reach enough to pay plaintiff's claims.³⁰⁴

³⁰¹ Webb v. Staves, 1 App. Div. 145, 37 N. Y. Supp. 414; Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. Supp. 66; Durand v. Hankerson, 39 N. Y. 287. The plaintiff is not restricted to the particular relief asked for in the complaint, but is entitled to relief as the facts proven warrant; and if it turns out that the particular relief asked for cannot be granted, but that other and different relief, consistent with the case made by the complaint and embraced within the issue, is proper, the court is bound to grant this relief and not turn the plaintiff out of court. For instance, where the property sought to be recovered and applied to the plaintiff's claim could not be reached because incapable of identification, the court should render a judgment to the extent of the value of the property received against the defendant so receiving it. Campbell Printing Press & Mfg. Co. v. Damon, 48 Hun. 509, 1 N. Y. Supp. 185. In what cases a creditor who has filed a bill in behalf of creditors generally, and obtained a decree, may be permitted to prove under it a claim not set up in the bill. Morris v. Mowatt, 4 Paige, 142.

³⁰² Genet v. Beekman, 26 N. Y. 35.

³⁰³ Claffin v. Maguire, 45 Super. Ct. (13 J. & S.) 521; Sage v. Mosher, 28 Barb. 287; Kelly v. Downing, 42 N. Y. 71.

³⁰⁴ Heywood v. Kingman, 29 Abb. N. C. 75.

§ 2497. Vacation.

A motion to vacate a judgment in a judgment creditor's action setting aside a fraudulent conveyance by the debtors will not be granted upon the sole ground that while the action to obtain it was pending he issued an execution on the original judgment, had the same property sold at sheriff's sale, and bid it in himself for the full amount of the execution.³⁰⁵

ART. III. ACTIONS AGAINST INSOLVENT ESTATES.

§ 2498. Statutes.

In 1858 a statute was passed which authorized a new class of actions, analogous in many respects to creditors' bills, to be brought for the benefit of all the creditors alike, by the assignee or other representative of an insolvent estate, to set aside fraudulent transfers by the debtor. Prior to 1858, an assignee had no more right to recover back property which his assignor had fraudulently conveyed than the assignor would have had.³⁰⁶ Under this statute, the creditor could not sue³⁰⁷—the representative had greater power than the creditor.³⁰⁸ In 1889, however, an amendment was added permitting a "creditor" of a "deceased" insolvent debtor, to sue to set aside any fraudulent transfer, without having first obtained a judgment on his claim. The statute is now embraced in section seven of the Personal Property Law and section two hundred and thirty-two of the Real Property Law. Section seven of the Personal Property Law provides as follows:

"Any executor, administrator,³⁰⁹ receiver,³¹⁰ assignee,³¹¹ or

³⁰⁵ *Erickson v. Quinn*, 50 N. Y. 697.

³⁰⁶ *Tradesmen's Nat. Bank v. Young*, 15 App. Div. 109, 114, 44 N. Y. Supp. 297.

³⁰⁷ *Spring v. Short*, 90 N. Y. 538; *Crouse v. Frothingham*, 97 N. Y. 105.

³⁰⁸ *Reynolds v. Ellis*, 103 N. Y. 115, 123.

³⁰⁹ Public administrator is included. *Leven v. Russell*, 42 N. Y. 251.

³¹⁰ Receiver pendente lite (*Ogden v. Arnot*, 29 Hun, 146) or receiver in supplementary proceedings (*Pettibone v. Drakeford*, 37 Hun, 628) is not included. See, also *Ward v. Petrie*, 157 N. Y. 301, 310.

³¹¹ Includes general assignee. *Southard v. Benner*, 72 N. Y. 424; *Niagara County Nat. Bank v. Lord*, 33 Hun, 560.

trustee, may, for the benefit of creditors or others interested in personal property held in trust, disaffirm, treat as void, and resist any act done, transfer, or agreements made, in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes, or in any manner interferes with, the personal property of a deceased person, or an insolvent corporation, association, partnership, or individual, is liable to such executor, administrator, receiver, or trustee for the same or the value thereof, and for all damages, caused by such act, to the trust estate.³¹² A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in the estate, disaffirm, treat as void, and resist acts done, or conveyances, transfers, and agreements made, in fraud of creditors or maintain an action to set aside such act, conveyance, transfer or agreement. Such claim, if disputed, may be established upon the trial of such action. The judgment may provide for the sale of the property involved, when a conveyance or transfer of the same is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law."

Section 232 of the Real Property Law makes a like provision, in nearly identical language, as to real property.

§ 2499. Conditions precedent.

A representative named in the statute may bring the action without obtaining a judgment and notwithstanding that a part or all of the creditors are simple contract creditors. Such actions require no lien but are maintainable by force of the statute.³¹³ So a creditor of a "deceased" insolvent debtor

³¹² Statute does not authorize an action to hold liable not only the transferee but also the transferer. *Ward v. Petrie*, 157 N. Y. 301, 310.

³¹³ *Spelman v. Freedman*, 130 N. Y. 421, 427.

need not be a judgment creditor,³¹⁴ though the fact that a creditor has obtained a judgment does not bar an action by him.³¹⁵ The remedy given by the amendment of the statute is not a new one but is the extension of an old and familiar remedy by relieving the creditor of the necessity of recovering judgment and issuing execution. The statute does not create a new cause of action but merely changes a rule of evidence by allowing the creditor to establish his debt by oral testimony instead of by the record of a judgment.³¹⁶

§ 2500. Necessity that fraud exist.

The right given to invalidate a transfer of property extends only to defects based on fraud or fraudulent intent. In other words, a conveyance invalid because of other reasons than fraud cannot be set aside in an action based on either of these statutes.³¹⁷

§ 2501. Who may sue.

Any of the representatives named in the statute may sue "for the benefit of creditors or others interested." And if the representative is one other than an executor or administrator, it seems that the primary right to sue rests in the representative.³¹⁸ If, however, the proper representative, on demand, neglects or refuses to sue, the creditor may sue alone or in behalf of himself and other creditors, making the representative a party defendant.³¹⁹

³¹⁴ *Cooke v. Chase*, 85 Hun, 616, 37 N. Y. Supp. 124.

³¹⁵ *Roselle v. Klein*, 42 App. Div. 316, 59 N. Y. Supp. 94.

³¹⁶ *National Shoe & Leather Bank v. Baker*, 148 N. Y. 581, 584.

³¹⁷ *Crisfield v. Bogardus*, 18 Abb. N. C. 334, which held that assignee could not take advantage of the failure to file a mortgage. See, also, *Nill v. Phelps*, 20 Misc. 488, 46 N. Y. Supp. 662.

³¹⁸ *Swift v. Hart*, 35 Hun, 128; *Spring v. Short*, 90 N. Y. 538; *Crouse v. Frothingham*, 97 N. Y. 105; *Dorothy v. Servis*, 46 Hun, 628. That assignee for benefit of creditors has primary right to sue applies only where the assignment is valid. *Loos v. Wilkinson*, 110 N. Y. 195.

³¹⁹ *Spelman v. Freedman*, 130 N. Y. 421, 427; *Prentiss v. Bowden*, 145 N. Y. 342. But the mere fact that the representative cannot sue does

It will be noticed that the creditor authorized by the statute to sue is the creditor of a "deceased" insolvent debtor. Such a creditor has a primary right to sue so that the representative need not be requested to bring the action and refuse, as a condition precedent to the right of the creditor to sue.³²⁰ The creditor's action, in such a case, must be brought for the benefit of all the creditors interested.³²¹ Section 786 of the Code, as to publication of notice to the other creditors to present their claims, applies, and unless it is complied with or some sufficient notice is given or the other persons are in some way given their day in court, such a proceeding does not conclude them.³²²

§ 2502. Defendants.

In an action by a representative to set aside a fraudulent assignment for the benefit of creditors, the creditors are proper but not necessary parties.³²³

§ 2503. Pleading.

A complaint in an action by a "creditor" is sufficient which alleges the death of the insolvent, the existence of a claim for more than one hundred dollars against him in favor of plaintiff, a conveyance by said debtor of all his property for no consideration and with intent to defraud his creditors, and that he left no other property with which to pay his creditors.³²⁴ If the action is brought by a creditor at large of a

not, of itself, authorize an action by a creditor. *Sullivan v. Miller*, 40 Hun, 516.

³²⁰ *National Bank of the Republic v. Thurber*, 39 Misc. 13, 17. See also, *Montgomery v. Boyd*, 78 App. Div. 64, 70, 79 N. Y. Supp. 879.

³²¹ *Matter of Thoesen*, 62 App. Div. 87, 70 N. Y. Supp. 924; *Louis v. Belgard*, 43 State Rep. 766, 17 N. Y. Supp. 882.

³²² *Matter of Thoesen*, 62 App. Div. 87, 96, 70 N. Y. Supp. 924. Construction of Code Civ. Proc. § 786, see vol. 1, p. 652.

³²³ *Genesee County Bank v. Bank of Batavia*, 43 Hun, 295.

³²⁴ *Rosselle v. Klein*, 42 App. Div. 316, 59 N. Y. Supp. 94. That general allegation as to insolvency is not a conclusion of law, see *Campbell v. Heiland*, 55 App. Div. 95, 66 N. Y. Supp. 1116.

deceased insolvent debtor, it must appear from the face of the complaint, and not from the title of the action merely, that it is so prosecuted.³²⁵

§ 2504. Judgment.

The judgment entered in an action by a creditor should not direct payment to the plaintiff of the entire amount of his debt, in the absence of proof that he is the only creditor of the deceased, but should provide for a pro rata distribution among all the creditors.³²⁶

§ 2505. Bringing of action by creditor as election of remedies.

The commencement of an action to set aside an assignment on the ground of fraud does not constitute an election to take in hostility to the assignment within the doctrine of election of remedies, and hence a creditor may take under the assignment notwithstanding his attack on it.³²⁷

³²⁵ *Louis v. Belgard*, 43 State Rep. 766, 17 N. Y. Supp. 882; followed in *Matter of Thoesen*, 62 App. Div. 87, 95, 70 N. Y. Supp. 924.

³²⁶ *Campbell v. Heiland*, 55 App. Div. 95, 66 N. Y. Supp. 1116. See, also, *Everingham v. Vanderbilt*, 51 How. Pr. 177.

³²⁷ *Matter of Garver*, 176 N. Y. 386, 394.

CHAPTER VI.

SEQUESTRATION PROCEEDINGS.

Nature and history of writ, § 2506.

Present use, § 2507.

§ 2506. Nature and history of writ.

According to Sir William Blackstone, sequestrations were first introduced in the reign of Queen Elizabeth, “before which the court found some difficulty in enforcing its process and decrees.” After an order for a sequestration issued, the bill of the plaintiff was taken *pro confesso* and a decree made accordingly, so that the sequestration seems to have been intended only to enforce the performance of the decree.¹ Sequestration, in chancery practice, was a remedy by writ for the taking of property, and the rents and profits thereof, either to enforce a decree, or to preserve the subject-matter of the suit.² It is also defined as a writ or commission issuing out of, and under the seal of, the court, directed to the sheriff or to certain persons of the complainant’s own nomination as a referee or receiver, empowering him or them to enter on and sequester the real and personal estate and effects of the defendant or some particular part thereof, and to take, receive, and sequester the rents, issues, and profits thereof, and to keep the same in their hands, or pay the same in such manner and to such persons as the court shall, in its discretion, appoint, until the defendant shall have performed the act ordered and enjoined by the court.³ The person to whom the sequestration was made, was sometimes called the sequestrator.

¹ 3 Bl., Comm. 444.

² Cyc. Law Dict. 840.

³ 1 Barb. Ch. Pr. 68.

§ 2507. Present use.

The remedy is now practically superseded by receivership proceedings and kindred remedies, though so called sequestration is allowed by statute in certain instances in corporation and matrimonial actions. Thus, sequestration of the property of the husband is allowable to enforce payment of alimony,⁴ and where an execution against a corporation has been returned unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestering the property of the corporation, and providing for a distribution thereof.⁵ So also where a corporation is fined, and an execution against it is returned unsatisfied, an action may be brought in the name of the people to sequester the property of the corporation.⁶ Like proceedings are permissible to enforce the payment of taxes by a corporation.⁷ These matters will be fully considered in subsequent chapters.

⁴ Code Civ. Proc. § 1772.

⁵ Code Civ. Proc. § 1784 et seq.

⁶ Code Cr. Proc. § 682.

⁷ Laws 1896, c. 908, § 263.

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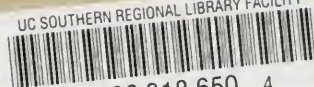
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